2019 IL App (1st) 160404-U

FOURTH DIVISION
March 29, 2019

No. 1-16-0404



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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County. |
| | ) | |
| v. | ) | No. 07 CR 16031 |
| | ) | |
| OSCAR FLORES, | ) | |
| | ) | Honorable |
| Defendant-Appellant. | ) | Maura Slattery Boyle, |
| | ) | Judge Presiding. |

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PRESIDING JUSTICE McBRIDE delivered the judgment of the court.
Justices Gordon and Burke concurred in the judgment.

**ORDER**

¶ 1 *Held*: (1) The State proved defendant guilty beyond a reasonable doubt; (2) defendant was not denied his right to a fair trial by codefendant Robert Macias appearing as a witness; (3) the testimony related to an individual known as Little Rowdy bragging about murders was not hearsay and was admissible; (4) defendant was not denied a fair trial where the prosecutors' actions and arguments were not improper; and (5) the trial court did not violate this court's prior order in allowing a caption for one MySpace photograph.

¶ 2 Following a jury trial, defendant Oscar Flores was found guilty of the first degree murder of Victor Casillas and the attempted murder and aggravated battery with a firearm of Leonel

Medina. Defendant appeals, arguing that (1) the State failed to proved him guilty beyond a reasonable doubt where the only evidence linking defendant to the shooting was a single unbelievable witness; (2) defendant was deprived of his rights to a fair trial and to confront and cross-examine witnesses against him when the State called codefendant Robert Macias[1] who refused to answer any questions; (3) defendant was deprived of his right to a fair trial by the State's introduction of prejudicial hearsay testimony; (4) defendant was deprived of his right to a fair trial based on pervasive misconduct by the prosecutors throughout trial; (5) the trial court erred in allowing the State to introduce a caption from a MySpace photo without foundation and in violation of this court's decision in *People v. Flores*, 2014 IL App (1st) 121786; and (6) on remand, this court should assign this case to a different trial judge.

¶ 3 The shootings occurred around 8:30 p.m. on March 19, 2007, near West 30th Street and South Kildare Avenue in Chicago. This is a direct appeal from defendant's second trial in this case. In his first appeal, this court reversed and remanded for a new trial based on a finding that defendant had invoked his right to remain silent and any subsequent statements were inadmissible. *People v. Flores*, 2014 IL App (1st) 121786, ¶ 63. This court also found the MySpace photographs to be admissible, but held that the captions were to be redacted because the State could not establish who wrote the captions. *Id*. ¶ 79.

¶ 4 Defendant's jury trial was conducted in July 2015. Prior to trial, the State sought leave to call Macias. Macias's attorney informed the trial court that Macias intended to assert his fifth amendment rights. The State requested Macias be given "use immunity[2]" in exchange for Macias's testimony, which the trial court granted. Defense counsel objected to the State's plan to

[1] Robert Macias was tried separately and convicted of first degree murder and attempted murder. See *People v. Macias*, 2015 IL App (1st) 132039. He is not a party to this appeal.

[2] "Use immunity" is defined as "Immunity from the use of the compelled testimony (or any information derived from that testimony) in a future prosecution against the witness." Black's Law Dictionary 754 (7th ed. 1999).

call Macias when he intended to invoke the fifth amendment. The trial court overruled the objection, noting the grant of use immunity.

¶ 5 At trial, the State called Robert Macias to testify. Defendant renewed his objection to Macias's testimony, which the trial court overruled. Macias remained silent while on the stand throughout all questioning and refused to take an oath to tell the truth. The prosecutor then asked several questions, for which Macias did not provide a response. Following these questions and outside the presence of the jury, the prosecutor informed the trial court that he had no further questions based on the lack of responses. Defense counsel stated that she was unable to ask any questions on cross-examination due to Macias's lack of response. Macias's attorney stepped forward and stated that Macias was asserting his fifth amendment privilege. No further questions were posed to Macias.

¶ 6 Leonel Medina testified that in March 2007, he was a member of the Two Six gang, but at the time of trial, was no longer a member. On March 19, 2007, at approximately 8:30 p.m., Medina was walking east on 30th Street near Kildare on his way to a friend's house. He turned to walk north on Kildare and noticed a blue and gray Astro van stop at the intersection. He observed two people in the van, a driver and a passenger. He described the occupants as male Hispanics, and "they seemed young." The passenger then pulled out a gun and began to shoot. Medina estimated that he was 20 feet away from the passenger side of the van. The passenger fired four to six times in Medina's direction. Medina began to run north on Kildare. He observed the van turn east onto 30th Street. He heard the tires "peal out [*sic*]" and heard someone yell the word, "king." Medina continued to his friend's house on South Kildare. When he arrived, he noticed blood on his thighs and realized he had been shot. He had four gunshot wounds, two on each of his thighs. He called 911 and an ambulance arrived to transport him to the hospital. He

later spoke with the police about the shooting. Medina subsequently viewed a photo array and lineups, but did not identify anyone.

¶ 7 Leonardo Gonzalez testified that he had been convicted of attempted murder and had received a sentence of 38 years in the Illinois Department of Corrections. However, Gonzalez denied shooting the victim in that case. He admitted to being a former member of the Two Six street gang with Victor Casillas. In March 2007, Gonzalez was 16 years old and Casillas was 15 years old.

¶ 8 On March 19, 2007, Gonzalez spent the day with Casillas at both Casillas's house and Gonzalez's house. They smoked marijuana and played video games. At around 4 p.m., they went to Piotrowski Park to "hang out." Gonzalez was unsure what time they left the park, but testified that it "was still just a little bit light but it was getting dark." They were walking on 30th Street near Karlov Avenue when he heard three or four gunshots behind them. Gonzalez told Casillas that they needed to "get the heck out of here." Gonzalez thought a rival gang might have fired the shots and testified that the rivals of the Two Six were the Latin Kings and Maniac Latin Disciples. They started to walk away toward Gonzalez's house at Karlov Avenue and 26th Street.

¶ 9 As they were walking, a van drove behind them and caught Gonzalez's attention. Gonzalez could not remember the color of the van, but described it as an Astro van. According to Gonzalez, Casillas made a gang sign disrespectful to the Latin Kings, specifically, "throwing the crown down". Gonzalez testified that he was on the passenger side of the van. The passenger in the van pulled out a gun and Gonzales "froze" as Casillas started to run. Gonzalez testified that he could not view the passenger. He could not tell if the passenger was a man or a woman, black or white or Hispanic. Gonzalez described the gun as an automatic, square and black.

¶ 10 The passenger then fired the gun. Gonzalez fell to the pavement. He then heard Casillas scream as he had been shot. Gonzalez lifted himself from the pavement and went toward Casillas. Casillas had fallen near 30th Street and Karlov Avenue. Gonzalez testified he threw bottles from the street at the van. The van then drove off towards Pulaski Road. Gonzalez remained with Casillas until the police arrived. Gonzalez did not want to accompany the police to the police station.

¶ 11 Gonzalez testified that the night of March 19, 2007, he told the police that he did not know who the shooter was. Later, on May 24, 2007, Gonzalez went to the police station again and viewed a lineup. Gonzalez testified that he identified someone in the lineup, but he told the police that he did not know "if it's him." He identified defendant in court as the person he selected in the lineup.

¶ 12 Gonzalez also testified that he did not remember speaking with Assistant State's Attorney (ASA) Stephanie Miller on May 24, 2007, but admitted that his signature appeared on a handwritten statement written by ASA Miller. He also identified two exhibits attached to the statement, one was a photograph of Casillas and the other was a photograph of defendant. Gonzalez then testified that he spoke with ASA Miller because the police "were making [him] mad" because he wanted to go to the hospital to visit his friend. The police told him that he could not go until he talked to them. The prosecutor then asked a question to clarify Gonzalez's testimony. The prosecutor asked Gonzalez if the statement he gave in May 2007 was given because of the way the police treated him after Casillas's murder in March. Gonzalez again responded that "they were making me mad because they wouldn't let me see my friend." Gonzalez admitted that in the statement he told the ASA that the passenger pulled out a black semiautomatic handgun and fired two shots, hitting Casillas, and he identified an attached

photograph of defendant as the shooter. Gonzalez also testified he did not remember telling ASA Miller that he had not been threatened or made promises in order for him to make the statement about the shooting. Gonzalez then testified that he was "really high" when giving the statement. He did not remember if he said that he was under the influence of drugs or alcohol in the statement.

¶ 13 Gonzalez further testified that he did not remember testifying before the grand jury in June 2007. The prosecutor asked Gonzalez about specific testimony he gave before the grand jury, but Gonzalez did not recall any of the testimony.

¶ 14 On cross-examination, Gonzalez testified that on the night of the shooting in March 2007, he did not identify anyone. Later in May 2007, he identified defendant in a lineup. Between those dates, Casillas's brother, Antonio Casillas came to Gonzalez with defendant's photograph and told Gonzalez to identify defendant. Antonio was not present at the time of the shooting. Gonzalez testified that defendant was not the shooter. Defendant was a Latin King and he believed a Latin King had committed the crime.

¶ 15 On redirect, Gonzalez remembered meeting with defense counsel and an investigator in June 2015. During that meeting, Gonzalez told them that Antonio and Casillas's mother wanted him to identify defendant because "the mom wanted justice." Gonzalez admitted that the June 2015 meeting was the first time he mentioned that Casillas's mother asked him to identify defendant.

¶ 16 ASA Stephanie Miller testified that in May 2007, she was employed in the felony review unit of the Cook County State's Attorney's office. She met with Gonzalez on May 26, 2007, and into May 27, 2007, at the Area 4 police district. She had a conversation with Gonzalez with a detective present and later took a handwritten statement from Gonzalez. In the statement,

Gonzalez identified defendant in a photograph as the person who shot Casillas. ASA Miller testified that during the interview, Gonzalez did not appear to be under the influence of drugs or alcohol. ASA Miller asked Gonzalez outside the presence of any police officers how he had been treated and if he had been threatened by anyone. Gonzalez told her that he had not been threatened. Gonzalez did not indicate to her that Antonio Casillas had threatened him.

¶ 17 ASA Bonnie Greenstein testified that on June 14, 2007, she presented Gonzalez to the grand jury. When she spoke with him prior to his testimony, Gonzalez did not tell her that he was forced to make an identification in a lineup. He did not make any complaints about the police or ASA Miller. Gonzalez also did not state that he was forced to make an identification by Antonio Casillas. During his testimony, Gonzalez identified defendant as the shooter and the passenger in the van. Gonzalez could not view the driver because the driver was wearing a "hoodie." He also testified that he was not under the influence of drugs or alcohol and that he had been treated "good."

¶ 18 Lorena Aguilar testified that at around 8:30 p.m. on March 19, 2007, she was walking east on 30th Street, between Tripp Avenue and Kildare Avenue, with her friend Elizabeth Hernandez when they heard gunshots. She looked behind them and observed a Chevy Astro van. When the van passed them, Aguilar saw two Hispanic males about 19 or 20 years old. She described the passenger as wearing a white t-shirt. After the van passed them, she heard more gunshots. They ran toward the gunshots and observed a boy on the ground "choking up" blood. She remained on the scene until the police arrived and told them which direction the van had traveled. Aguilar later viewed a photo array and two lineups, but was unable to identify anyone.

¶ 19 Lizette Martinez and Rita Serrano testified similarly that around 8:30 p.m. on March 19, 2007, they were walking Martinez's dog eastward on 30th Street, when they heard gunshots

behind them. Both women observed a gray van pass them with two occupants, a driver and a passenger. They then heard two more gunshots in front of them, near 30th and Karlov. When they went to that location, they each observed a young man on the sidewalk who had been shot.

¶ 20 Serrano described the passenger in the van as a bald Hispanic male wearing a white t-shirt. Martinez observed the van occupants were male, but was unable to discern their race. Both women separately viewed a photo array and a lineup, but neither made an identification.

¶ 21 Antonio Casillas testified that Victor Casillas was his younger brother. On March 19, 2007, Antonio was at home with his mother at the time of the shooting. His mother answered a phone call and learned that Casillas had been shot. Antonio went to 30th and Karlov with his mother. When he arrived, Antonio observed Casillas on the ground and the paramedics were trying to revive him. Casillas was taken from the scene and Antonio later learned that his brother had passed away. On March 21, 2007, Antonio received a phone call from an individual named Angel Rodriguez. Rodriguez told him that an individual known as "Little Rowdy" was "bragging" about shooting Casillas at Farragut High School. Rodriguez also told him that "Little Rowdy" was a Latin King member from near 27th and Drake. Antonio had heard the name "Little Rowdy," but did not know who "Little Rowdy" was.

¶ 22 Also on March 21, 2007, Antonio was visited by his cousin Cindy Bahena. Bahena had a MySpace social media account at that time, but Antonio did not. They logged into MySpace through the account of an individual named Gladys. They looked for photographs of "Little Rowdy." They sent a friend request to "Little Rowdy," which he accepted. They were then able to view photographs on that account. On "Little Rowdy's" account, they viewed photographs of Casillas and defendant. Antonio did not know defendant's name when he viewed the photographs on MySpace. Antonio subsequently obtained a Farragut High School yearbook and

found a photograph showing the same individual as the MySpace photograph and the name listed was Oscar Flores. Antonio identified defendant in court as the individual in the photographs. Antonio later shared this information with a detective working on the investigation and also provided the detective with login information to access MySpace.

¶ 23 On cross-examination, Antonio admitted that he was formerly a member of the Two Six gang, but testified that he quit in 2004 or 2005. He denied knowing that Casillas or Gonzalez were Two Six members. Antonio could not recall knowing the year of the Farragut yearbook he viewed. Defense counsel asked Antonio if he recalled prior testimony in which he testified viewing the 2006 to 2007 yearbook, but he could not recall. Antonio denied "having it out for Little Rowdy" after speaking with Rodriguez. Antonio testified that he knew Gladys when they logged into her MySpace account.

¶ 24 Antonio denied showing defendant's picture to Gonzalez. Antonio testified that he knew of Gonzalez, but did not know Gonzalez was friends with his brother. He admitted to calling Gonzalez to tell him that the police were looking for him, but did not tell Gonzalez about the MySpace photograph.

¶ 25 Evangeline Martinez testified that she was Casillas's mother. She knew Gonzalez was friends with Casillas. She denied having any conversations with Gonzalez after Casillas's death. Martinez further denied telling Gonzalez that he needed to identify anyone in the case, and specifically did not tell him to identify defendant.

¶ 26 Yolanda Gutierrez testified that her 1989 Chevy Astro van was stolen on March 16, 2007, and she did not know who stole her vehicle.

¶ 27 Detective Greg Swiderek testified that he was assigned with his partner, Detective David Roberts, to investigate the shooting at around 8:40 p.m. on March 19, 2007. The detectives

proceeded to 30th and Karlov. When they arrived, Casillas had already been removed from the scene. He observed two shell casings in the street. While there, Detective Swiderek learned of another crime scene at 30th and Kildare and he went to that location. He then observed four shell casings on the street. There were forensic investigators at both locations collecting evidence and taking photographs. He also spoke with Medina about the shooting, but after their conversation, Detective Swiderek did not have a suspect in the shooting.

¶ 28 On March 22, 2007, an officer told Detective Swiderek that a Latin King named Abraham Barajas, nicknamed Diaper Evil, had been bragging that he was the shooter. On March 28, 2007, Detective Swiderek spoke with another officer who informed him that Antonio told the officer that an individual called Little Rowdy was bragging about the shooting on MySpace and at Farragut High School. The officer gave him the name Oscar Flores, but the officer knew defendant as Little Panther, not Little Rowdy.

¶ 29 Detective Swiderek obtained a photograph of defendant and showed it to Antonio. Antonio told the detective it was same picture he had viewed on MySpace of the individual bragging about the shooting. Detective Swiderek received the two MySpace photographs obtained by Antonio of defendant and Casillas. Detective Swiderek created a photo array using pictures of defendant and Barajas. The photo array was shown separately to Lizette Martinez, Serrano, Aguilar, and Elizabeth Hernandez, but none of the women were able to make an identification.

¶ 30 In May 2007, Detective Swiderek placed defendant in a lineup. Lizette Martinez, Serrano, Aguilar, and Hernandez each viewed the lineup, but none were able to make an identification. Gonzalez viewed the lineup and identified defendant as the person who shot Casillas. Detective Swiderek testified that Gonzalez did not tell him that he was having second

thoughts about identifying defendant. Detective Swiderek also testified no one in his presence threatened Gonzalez to make an identification. Gonzalez did not tell him that Antonio had threatened him to identify defendant, that he identified defendant because Casillas's mother begged him to make an identification, or that he identified defendant because he was a Latin King. Gonzalez also viewed a photo array with Barajas's picture in it, but Gonzalez did not make an identification. Medina also viewed a photo array with Barajas, but he did not make an identification. Detective Swiderek did not consider Barajas a suspect in the shooting after he was not identified by any of the witnesses.

¶ 31 In June 2007, Detective Swiderek interviewed codefendant Macias about the shootings. Detective Swiderek showed Macias defendant's photograph. The detective asked Macias if defendant was involved in the shooting. He also showed Macias Casillas's picture and asked if Macias knew who Casillas was. During the interview, Macias made an incriminating statement and was subsequently charged with murder and attempted murder. Gonzalez, Medina, Aguilar, Serrano, and Lizette Martinez each viewed a lineup with Macias, but no one made an identification.

¶ 32 On July 14, 2007, Detective Swiderek along with two other detectives went to defendant's home to arrest him. Defendant's mother answered the door and allowed the detectives into the home, but told them her daughter was the only one home and she was in the shower. Detective Swiderek knocked on the bathroom door and asked the person in the shower to come out. He heard a female sounding voice and then asked the person to come out to talk. Detective Swiderek then heard a male voice say he would be out in a minute. Defendant then exited the bathroom. After defendant dressed, he was placed under arrest.

¶ 33 On cross-examination, Detective Swiderek testified that he did not speak with Barajas, even though he had his name and address. He also testified that he was given the photographs of defendant and Casillas by another officer, and later Antonio showed him the photos on a computer at Antonio's house. He did not recall prior testimony in which he testified that Antonio gave him the photographs. He also did not recall testifying that Antonio did not show him the photographs on the computer. Defense counsel asked if it was correct that the only person who could connect defendant to the nickname Little Rowdy was Antonio. Detective Swiderek responded that Macias connected defendant to the name. Counsel asked the detective if he remembered prior testimony in which he testified that Antonio and Bahena were the only people who could connect defendant to the nickname, and Detective Swiderek answered that he could have said that. He admitted that he never spoke with Bahena, but another detective spoke with her. Detective Swiderek admitted that he never was on the MySpace page for Little Rowdy, nor did he make any efforts to connect defendant to the MySpace page.

¶ 34 On redirect, Detective Swiderek testified that he did not pursue Barajas because he did not have any additional information, such as the MySpace photographs or identifications. He also testified that he showed Macias a picture and Macias indicated that defendant was Little Rowdy.

¶ 35 On recross, Detective Swiderek admitted that he did not question Barajas because he only had a tip. He further admitted that when Antonio gave him the MySpace photographs and said he had been bragging about the shooting, that information was a tip. On redirect, over defense counsel's objection, Detective Swiderek identified two exhibits, one was a MySpace photograph used at trial which had a redaction at the bottom and the second was another copy of the same photograph without the redaction of the caption. The caption read, "Little Bonez Rotsk."

Detective Swiderek testified that "Little Bonez" was Casillas's nickname and that the phrase in gang terminology meant that Little Bonez "rots, rots in hell. He's dead." Detective Swiderek further testified that the photograph with the caption came from Little Rowdy's MySpace page.

¶ 36 Officer Timothy Finley testified that he previously was assigned to the gang team in the 10th district, which included the area of the shooting. In March 2007, he was assigned to the 10th district. During his time on the gang team, he became familiar with gangs, primarily the Latin Kings, Two Six, Two Two Boys, and the Satan Disciples. He described the territory for the Latin Kings and the Two Six, the hand symbols used for each gang, and how to use the hand symbols to show disrespect for a gang. He testified about the caption in the MySpace photo, "Little Bonez Rotsk." In gang context, he stated that "tsk" means "Two Six Killer" and was used by members of the Latin Kings to show disrespect to the Two Six gang.

¶ 37 The parties stipulated that four casings were found near the Medina shooting and two casings were found by the Casillas shooting. All six casings were "WIN 380" casings and were fired from the same gun. There were no fingerprints suitable for comparison on any of the casings. The parties also stipulated to the autopsy findings, that Casillas was shot one time, and the bullet went through his left arm into his chest and through his left lung, heart and right lung, before lodging in his right chest wall. The cause of death was a single gunshot wound and the manner of death was homicide.

¶ 38 The parties entered stipulations from three investigators about statements made by Gonzalez. Gonzalez told an investigator in 2009 that one guy in the van was wearing a hooded sweatshirt and the other was bald, he did not observe their faces, but the shooter had a long black gun. Gonzalez and his girlfriend were at Antonio's house two or three days after the shooting and Antonio showed them MySpace photos and were told that the people in the photographs

were called "King Trouble" and "King Criminal" and were bragging about the shooting. Gonzalez stated that was when his memory came back, and he told Antonio the guys in the photographs were the ones who did the shooting. Gonzalez told another investigator in 2011 that he remembered observing the gun stick out of the vehicle and he remembered the gun "very well," but he did not get a look at the shooter. Gonzalez did not recognize the person in the MySpace photograph, but agreed to say he was the shooter because Antonio asked him and he felt "paternalistic" towards Casillas. When he identified defendant in a lineup, he felt bad about the false identification, but he identified defendant because Antonio asked him. He identified defendant because he was a Latin King. Gonzalez told a third investigator in 2015 that Antonio told him to the tell the police the person in the MySpace photograph was the person who shot Casillas, and at first Gonzalez did not agree to do it, but Casillas's mother begged him and cried. He then agreed to do it. When he viewed the lineup, Gonzalez tried to tell the police he did not recognize the shooter. He said the police told him he could be charged if he did not pick the same person as the individual depicted in the MySpace photo.

¶ 39 The State then rested. Defendant moved for a directed finding, which the trial court denied. In defendant's case, the parties stipulated that Detective Swiderek testified on October 26, 2011, that Antonio handed him two photographs, and that Antonio and Bahena were the only two people who could connect the nickname Little Rowdy to Oscar Flores. The defense then rested.

¶ 40 Following closing arguments, the jury found defendant guilty of the first degree murder of Casillas and that he personally discharged a firearm that proximately caused Casillas's death. The jury also found defendant guilty of the attempted murder of Medina, and aggravated battery. Defendant filed a motion for a new trial, which the trial court denied. After hearing factors in

aggravation and mitigation, the court sentenced defendant to consecutive terms of 29 years, 25 years, 20 years, and 6 years in the Illinois Department of Corrections. The trial court denied an oral motion to reconsider the sentence.

¶ 41 This appeal followed.

¶ 42 Defendant first argues that the State failed to prove him guilty beyond a reasonable doubt because the only admissible evidence linking defendant to the shooting is Gonzalez's recanted identification. The State maintains the evidence was sufficient to support defendant's convictions.

¶ 43 When this court considers a challenge to a criminal conviction based upon the sufficiency of the evidence, it is not our function to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). Rather, our inquiry is limited to "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); accord *People v. Cox*, 195 Ill. 2d 378, 387 (2001). It is the responsibility of the trier of fact to "fairly *** resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. "The trier of fact is best equipped to judge the credibility of witnesses, and due consideration must be given to the fact that it was the trial court and jury that saw and heard the witnesses." *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007). "Accordingly, a jury's findings concerning credibility are entitled to great weight." *Id*.

¶ 44 The reviewing court must carefully examine the record evidence while bearing in mind that it was the fact finder who observed and heard the witnesses. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). Testimony may be found insufficient under the *Jackson* standard, but only

where the record evidence compels the conclusion that no reasonable person could accept it beyond a reasonable doubt. *Id*. Only where the evidence is so improbable or unsatisfactory as to create reasonable doubt of the defendant's guilt will a conviction be set aside. *Hall*, 194 Ill. 2d at 330.

¶ 45 Defendant focuses on Gonzalez's testimony recanting his "dubious" identification. Defendant also asserts that much of the other evidence was inadmissible, the eyewitnesses contradict Gonzalez's identification, none of the other witnesses identified defendant despite giving a description, and no other evidence links defendant to the shooting.

¶ 46 "The State bears the burden of proving beyond a reasonable doubt the identity of the person who committed the charged offense." *People v. Lewis*, 165 Ill. 2d 305, 356 (1995).The testimony of a single witness, if it is positive and the witness is credible, is sufficient to convict. *People v. Smith*, 185 Ill. 2d 532, 541 (1999). Illinois courts consider identification testimony under the factors set forth by the Supreme Court in *Neil v. Biggers*, 409 U.S. 188 (1972). *Id.* Those factors include: "(1) the opportunity the victim had to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description of the criminal; (4) the level of certainty demonstrated by the victim at the identification confrontation; and (5) the length of time between the crime and the identification confrontation." *Id.*

¶ 47 These factors support Gonzalez's identification. On March 19, 2007, Gonzalez was with Casillas when he heard gunshots behind them and observed the Astro van pull up by them. Gonzalez testified that he was 10 to 15 feet away from defendant when the shooting began. Gonzalez testified that it was still light outside, but was beginning to become dark. He made the

lineup identification two months after the shooting. He maintained his identification in a handwritten statement to ASA Miller and in his grand jury testimony.

¶ 48 Defendant contends that the initial identification was suspect because it occurred two months after the shooting. " 'The lapse of time goes only to the weight of the testimony, a question for the jury, and does not destroy the witness's credibility.' " *People v. Austin*, 328 Ill. App. 3d 798, 805 (2002) (quoting *People v. Rodgers*, 53 Ill. 2d 207, 214 (1972)). However, we note that identifications made after longer periods of time have been found reliable. See *People v. Malone*, 2012 IL App (1st) 110517, ¶ 36 (identification one year and four months after crime); *Rodgers*, 53 Ill. 2d at 214 (identification made two years after crime).

¶ 49 The evidence presented at trial was sufficient for a jury to find defendant guilty beyond a reasonable doubt. Gonzalez repeatedly identified defendant as the shooter prior to trial. He identified defendant in a lineup, in a statement to the ASA, and in his grand jury testimony. However at trial, Gonzalez testified that his identification was the result of pressure from Casillas's brother and mother. Gonzalez did not indicate in his statement or grand jury testimony that his identification was coerced, either by the police or Casillas's family members. Gonzalez's prior inconsistent statements were presented as substantive evidence under section 115-10.1 of the Code of Criminal Procedure of 1963. 725 ILCS 5/115-10.1 (West 2014). " '[I]t is the jury's decision to assign weight to the statement and to decide if the statement was indeed voluntary, after hearing the declarant's inconsistent testimony.' " *People v. Morrow*, 303 Ill. App. 3d 671, 677 (1999) (quoting *People v. Pursley*, 284 Ill. App. 3d 597, 609 (1996)). " 'Once a jury or trial court has chosen to return a guilty verdict based upon a prior inconsistent statement, a reviewing court not only is under no obligation to determine whether the declarant's testimony was "substantially corroborated" or "clear and convincing," but it may *not* engage in any such

analysis.' " (Emphasis in original.) *Id*. (quoting *People v. Curtis*, 296 Ill. App. 3d 991, 999 (1998)). In its verdict, the jury concluded that Gonzalez was telling the truth in his prior statements and was not truthful at trial. See *id*. at 677-76.

¶ 50 While a prior inconsistent statement admitted as substantive evidence is sufficient to support a jury verdict, the testimony of other occurrence witnesses supports Gonzalez's testimony about the circumstances of the shooting. Medina, Martinez, Serrano, and Aguilar all testified about observing an Astro van near 30th Street and Kildare. Each observed two male Hispanics in the van with the passenger wearing a white t-shirt, and all but Aguilar described the passenger as bald. Aguilar, Serrano, and Martinez each testified about hearing gunshots twice with the second set occurring after the van passed them. The police recovered shell casings at both locations.

¶ 51 The jury heard Gonzalez's testimony at trial in which he recanted his identification as well as his prior statements identifying defendant as the shooter. The jury was able to weigh all the evidence presented, including Gonzalez's prior inconsistent statements, to reach its verdict. We will not substitute our judgment for that of the trier of fact on issues involving the weight of evidence or the credibility of witnesses. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009). After reviewing the evidence in the light most favorable to the State, we cannot say that the evidence was so improbable that no rational trier of fact could have found defendant guilty beyond a reasonable doubt.

¶ 52 Next, defendant contends that he was deprived of his constitutional right to a fair trial and to confront witnesses against him when the State called codefendant Macias. Specifically, defendant asserts that the State knew Macias would refuse to answer questions despite being granted use immunity and the prosecutor was allowed to ask leading questions insinuating that

Macias implicated defendant in the shooting. The State responds that Macias was properly called as a witness and admissible evidence from other sources was presented to the jury on the topics covered by the prosecutor's questions to Macias. See *In re Rolandis G.*, 232 Ill. 2d 13, 43 (2008) (a court may consider whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence in determining whether error is harmless beyond a reasonable doubt).

¶ 53 Generally, we review a trial court's decision regarding the admission of certain testimony for an abuse of discretion. However, since defendant claims that his sixth amendment confrontation rights were violated, this involves a question of law, which we review *de novo*. *People v. Lovejoy*, 235 Ill. 2d 97, 141-42 (2009)

¶ 54 The sixth amendment to the United States Constitution provides: "In all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him ***." U.S. Const., amend. VI. A defendant's right to confrontation includes the right to cross-examine. *People v. Blue*, 205 Ill. 2d 1, 12 (2001); *Douglas v. Alabama*, 380 U.S. 415, 418 (1965). "Generally, a witness is considered subject to cross-examination when he is placed on the stand under oath and willingly answers questions and the opposing party has an opportunity to cross-examine him." *People v. Leonard*, 391 Ill. App. 3d 926, 934 (2009).

¶ 55 "Under the fifth amendment, a witness in a criminal case may refuse to answer questions which might incriminate him when he has reasonable cause to believe he might subject himself to prosecution if he answers." *People v. Ousley*, 235 Ill. 2d 299, 306 (2009). A defendant may use the fifth amendment privilege until his conviction has become final. *Id*. "The State can seek a grant of use immunity for a witness who has refused or is likely to refuse to testify on the basis of his fifth amendment rights." *People v. Zambrano*, 2016 IL App (3d) 140178, ¶ 24 (citing

*Ousley*, 235 Ill. 2d at 316). Under Illinois law, upon motion of the State, a court "shall order that a witness be granted immunity from prosecution in a criminal case as to any information directly or indirectly derived from the production of evidence from the witness if the witness has refused or is likely to refuse to produce the evidence on the basis of his or her privilege against self-incrimination." 725 ILCS 5/106-2.5(b) (West 2014). "The production of evidence so compelled under the order, and any information directly or indirectly derived from it, may not be used against the witness in a criminal case, except in a prosecution for perjury, false swearing, or an offense otherwise involving a failure to comply with the order. An order of immunity granted under this Section does not bar prosecution of the witness, except as specifically provided in this Section." 725 ILCS 5/106-2.5(c) (West 2014).

¶ 56 Our supreme "court has held on several occasions that it is reversible error for the prosecutor to compel a witness to claim his constitutional privilege before the jury when the effect is to suggest by implication or innuendo that the defendant is guilty of a crime." *People v. Crawford Distributing Co.*, 78 Ill. 2d 70, 74 (1979). "However, the act of a prosecutor calling a witness to the stand with advance knowledge that the witness will invoke the fifth amendment may or may not be error. Each case must be decided in light of its own facts and circumstances, and consideration must be given to the motive of the prosecutor in calling the witness and to the likelihood of the jury drawing unwarranted inferences against the defendant from the fact that the witness has declined to testify on constitutional grounds." *Id.* at 74-75. The supreme court noted two situations in which reversible error has occurred: (1) where the prosecutor makes a conscious attempt to build a case out of inferences; and (2) the witness's refusal to answer added critical weight to the State's case in a form not subject to cross-examination. *Id.* at 75.

¶ 57 In this case, prior to Macias's testimony, the trial court granted use immunity to Macias. The prosecutor indicated that he did not know what Macias would say after the grant of use immunity. Once on the stand, Macias remained silent, refusing to swear the oath to tell the truth or answer any questions. The prosecutor then asked Macias the following questions to which defense counsel objected after each, and to which the trial court overruled each objection.

Q: "Could you please introduce yourself to the ladies and gentlemen of the jury?"

Q: "Are you Robert Macias?"

Q: "Sir, on July 2, 2015, did you have a telephone conversation from Menard Prison with the defense attorney *** and her investigator?"

Q: "Were you convicted of first degree murder and attempt first degree murder for this case and sentenced to [75] years in the Illinois Department of Corrections?"

Q: "On June – June 4, 2007, were you arrested and taken to Area 3 Detective Headquarters?"

Q: "And at Area 3 Detective Headquarters, were you given your *Miranda* rights and made a statement in which you admitted to being the driver in the drive-by shooting of Victor Casillas *** and Leonel Medina?"

Q: "In your conversation with the detectives in this case, did you admit to driving a stolen minivan?"

Q: "Do you know the defendant, Oscar Flores?"

Q: "Are you member of the Latin King street gang?"

Q: "Is your nickname Baby Evil?"

> Q: "Are the Two Six street gang and Latin King street gang, were they at war in the year 2007?"

¶ 58 After these questions and outside the presence of the jury, the prosecutor stated that he had no further questions based on the lack of responses. Defense counsel stated that she was unable to ask any questions on cross-examination due to Macias's lack of response. Macias's attorney stepped forward and stated that Macias was asserting his fifth amendment privilege. No further questions were posed to Macias and he was dismissed. Outside the presence of the jury and at a later time, the trial court later entered a contempt order against him.

¶ 59 During jury instructions, the trial court instructed the jury to disregard the questions posed to Macias as follows.

> "An individual was called to the witness stand that remained [mute.] You are not to concern yourselves with the reasons that individual remained [mute] or the individual's motivation for choosing to remain [mute.]
>
> You should disregard any questions posed to this individual or objections made to the questions posed to the individual. The questions posed to the individual[] and objections made to the questions posed to the individual are not evidence and may not be considered by you in reaching the verdict."

¶ 60 Defendant contends that the questions posed to Macias set forth "the crux of his inculpatory statement," and the State was able to set forth its theory of the case without defendant having the ability to cross-examine Macias. According to defendant, the prosecutor's questions amounted to testimony that urged the jury to infer that Macias had confessed to the crime and named defendant as the shooter. Defendant asserts that this case "parallels" the

decision in *People v. Evans*, 2016 IL App (3d) 140120, where the Third District found that the defendant's right to confrontation was violated and the error was not harmless.

¶ 61 In *Evans*, the defendant was on trial for a first degree murder committed during an attempted armed robbery. The codefendant was given use immunity and called to the stand. The codefendant told the trial court that he still intended to "plead the fifth" despite the grant of use immunity. The codefendant answered some initial questions, but when asked about the circumstances of the crime, he pled the fifth. During the questioning, the codefendant responded that the defendant was an "associate," and identified him in court. The codefendant admitted that he was in the Department of Corrections for first degree murder under an accountability theory. The prosecutor directly asked the codefendant about the circumstances of the crime, such as, if he remembered going to the gas station on the date of the murder, if he was with the defendant that day, if he remembered when the store clerk died, if he remembered the gun he touched, and if he knew his fingerprints were on the gun. The prosecutor also asked, "When the two of you went in the store, was the purpose to rob the store clerk, but that you were simply at that point going to see how many people were in the store." The prosecutor continued to ask questions about the robbery and the defendant's actions, including what the defendant said to the store clerk and specifically, whether the defendant shot the clerk. *Id*. ¶ 14.

¶ 62 On appeal, the defendant asserted that the questioning of the codefendant violated his confrontation rights. The State contended that the questioning was proper to impeach the codefendant with a prior statement, but the reviewing court found that a proper foundation had not been made and the prosecutor failed to offer any proof of the statement to complete the impeachment. *Id*. ¶ 36. The reviewing court also rejected the State's assertion that the questioning of the codefendant was proper to refresh his recollection after his answer to a

question posed to him was, "I don't remember." *Id*. ¶¶ 39-40. The *Evans* court then turned to the question of whether the defendant's confrontation rights had been violated.

> "[T[he prosecutor asked multiple leading and suggestive questions regarding all of the circumstances surrounding the alleged robbery and the murder of the store clerk on the day in question, which [the codefendant] refused to answer. [The codefendant] responded 'I plead the Fifth' to 20 questions. As a result of the leading questions, the State's theory of the case regarding the circumstances of the murder was placed before the jury. Again, with no attempt to put into evidence [the codefendant's] prior statement, the testimonial aspects of the examination of [the codefendant] regarding the circumstances of the crime came from the prosecutor's questions and not from [the codefendant]." *Id*. ¶ 49.

¶ 63 The reviewing court concluded that the defendant's right to confrontation was violated by the prosecutor's leading and suggestive questions. *Id*. ¶ 52. Further, the court found that the defendant was prejudiced by the prosecutor's questioning of the codefendant "where the prosecutor's questions insinuated that a robbery was planned, a robbery occurred, defendant initiated the robbery, and defendant was the gunman who shot and killed the store clerk." *Id*. ¶ 56. The court noted that the evidence was not overwhelming and held that the "questions created a substantial risk that the jury would look to the implicit statements therein, which were not in evidence, to determine the defendant's guilt" and the error was not harmless beyond a reasonable doubt and remanded for a new trial. *Id*. ¶ 58.

¶ 64 Defendant also relies on the Fourth District's decision in *People Izquierdo*, 262 Ill. App. 3d 558 (1994), for support. In that case, the defendant argued that the State committed reversible error when it called a witness knowing he was not going to cooperate. Prior to calling the

witness, the prosecutor indicated that he wanted to call the witness as a hostile witness because the witness initially had written a letter to the State's Attorney about an incriminating conversation with the defendant, but had later written another letter denying the content of the first letter. The prosecutor was concerned the witness would change his story and was reluctant to testify. The trial court did not allow the witness to be called as an adverse witness. *Id*. at 563. The prosecutor then called the witness. The witness answered initial questions about charges pending against him and his stay in the county jail. The prosecutor then asked if any deals or offers had been made for his testimony, and the witness responded, " 'No. Well, you know, I've been over there and you don't believe me. You know, you believe me when it suit your benefits. I would like to plead the Fifth.' " *Id*. The prosecutor then asked if the witness had conversations with the defendant and if there was "something incriminating about conversations" with the defendant. The witness pled the Fifth for the question and did not respond to the second. *Id*. The prosecutor asked the court to direct the witness to answer and said he had a motion to make. The jury was then excused to the jury room. *Id*.

¶ 65 On appeal, the Fourth District recognized that it is not automatically error to call a witness when the prosecutor has advance knowledge that the witness will invoke the fifth amendment. *Id*. However, "[i]t is reversible error for a prosecutor to force a witness to assert his fifth amendment privilege if either the State makes an obvious attempt to build its case out of inferences arising from the privilege or where the witness' refusal to testify added critical weight to the State's case." *Id*. The court concluded that it was reversible error to call the witness in that case.

> "In this case, the prosecutor was not allowed to treat the witness as hostile and ask a series of leading questions setting forth the State's theory of the case. In

> addition, the jury was instructed to disregard the appearance of the witness and not consider his presence in their deliberations. However, there was no reason to call [the witness] other than to testify *against* defendant and his lack of cooperation reflected badly on defendant. The prosecutor's motive was to have the jury infer [the witness] was trying to hide information which could hurt defendant. It was reversible error for the prosecutor to call [the witness] as a witness in these circumstances knowing he would invoke his fifth amendment privilege." (Emphasis in original.) *Id.* at 563-64.

¶ 66 We find the prosecutor's questioning in this case to be distinguishable from the improper questioning in both *Evans* and *Izquierdo*. Contrary to defendant's assertion, the questions posed by the prosecutor did not suggest that Macias had named defendant as the shooter. The only question involving defendant was whether Macias knew defendant. The other questions related to Macias's involvement in the shootings as the driver and his gang involvement. Unlike in *Evans*, the prosecutor did not ask specific questions about the crime, and significantly, he did not ask about defendant's involvement in the shootings. Further, we point out that the jury in *Evans* was not instructed to disregard the questions posed to the codefendant in reaching its verdict. In *Izquierdo*, the witness was not granted use immunity and was asked specifically if the defendant had participated in incriminating conversations while in the county jail. We also note that use immunity was not at issue in *Izquierdo*. In contrast with *Izquierdo*, Macias's testimony did not infer that Macias was hiding information that would harm defendant. We find the present case distinguishable from both of these cases.

¶ 67 We find that defendant's confrontation rights were not violated in this case. First, neither of the situations amounting to reversible error were present: the prosecutor did not make a

conscious attempt to build his case out of inferences in the questions asked and Macias's refusal to answer did not add critical weight to the State's case in a form not subject to cross-examination. See *Crawford Distributing*, 78 Ill. 2d at 75. Second, the trial court instructed the jury to disregard the questions posed as well as Macias's reasons for remaining mute. "Absent some indication to the contrary, we must presume that jurors follow the law as set forth in the instructions given them." *People v. Wilmington*, 2013 IL 112938, ¶ 49 (citing *Richardson v. Marsh*, 481 U.S. 200, 206 (1987)). We note that the State's case involved more than a dozen witnesses and Macias was called to the stand early in the State's case.

¶ 68 Further, we disagree with defendant's assertion that the prosecutor acknowledged that his questioning was unfair. When viewed in context of the jury instruction conference, the prosecutor was asserting that the proposed jury instruction should be given because it was unfair for the jury to consider Macias's actions during deliberations.

> "I believe it's an accurate statement of the law. He came in and refused to identify himself. And, Judge, it would be unfair at any point in this trial to hold Macias' actions, who even though he was granted immunity in this case, he still refused to even identify himself, Judge, and I think it would be unfair at this point to have his actions held against the defendant. And it's basically an accurate statement of what happened here."

This statement was not conceding error, but seeking to instruct the jury appropriately. Given the questions asked and the trial court's jury instruction to disregard, we find no reversible error. We do not condone the prosecution's strategy in asking these questions, but even if there was error, that error did not prejudice defendant and was harmless. "[A] a reviewing court 'may invoke the harmless error doctrine to dispose of claims of error that have a *de minimus* impact on the

outcome of the case.' " *People v. Carter*, 389 Ill. App. 3d 175, 181 (2009) (quoting *People v. Blue*, 189 Ill. 2d 99, 138 (2000)).

¶ 69 Defendant next asserts that the State improperly used prejudicial and inflammatory hearsay evidence to connect defendant to the shootings. Specifically, defendant argues that the testimony from Antonio and Detective Swidererk regarding another person who told Antonio that someone called "Little Rowdy" was bragging at Farragut High School about killing Casillas. Defendant contends that this testimony was highly prejudicial and violated his confrontation rights. The State responds that the evidence was not offered for the truth of the matter asserted, but rather to explain the effect on the listener and to detail the course of the police investigation.

¶ 70 The hearsay rule generally prohibits the introduction of an out-of-court statement used to prove the truth of the matter asserted. *People v. Spicer*, 379 Ill. App. 3d 441, 449 (2007). "Hearsay statements are excluded from evidence primarily because of the lack of an opportunity to cross-examine the declarant." *People v. Peoples*, 377 Ill. App. 3d 978, 983 (2007). Additionally, pursuant to *Crawford v. Washington*, 541 U.S. 36 (2004), the Illinois Supreme Court has found that under the confrontation clause of the United States Constitution "a testimonial statement of a witness who does not testify at trial is never admissible unless (1) the witness is unavailable to testify, and (2) the defendant had a prior opportunity for cross-examination." *People v. Stechly*, 225 Ill. 2d 246, 279 (2007) (citing *Crawford*, 541 U.S. at 53-54). However, the *Stechly* court observed that the United States Supreme Court has "made clear that the confrontation clause has *no* application to *non* testimonial statements." (Emphasis in original.) *Id.* (citing *Davis v. Washington*, 547 U.S. 813, 821 (2006)). The Illinois Supreme Court found that "those 'witnesses' whom the confrontation clause gives a defendant the right to confront are those who bear 'testimony,' *i.e.*, solemn declarations for the purpose of establishing

or proving some fact germane to the defendant's prosecution." *Id*. at 280-81. More recently, the United States Supreme Court held "[s]tatements made to someone who is not principally charged with uncovering and prosecuting criminal behavior are significantly less likely to be testimonial than statements given to law enforcement officers." *Ohio v. Clark*, ___ U.S. ___, 135 S. Ct. 2173, 2182 (2015). "However, an out-of-court statement that is offered for a purpose other than to prove the matter asserted is not hearsay and does not implicate the confrontation clause." *People v. Whitfield*, 2014 IL App (1st) 123135, ¶ 25.

¶ 71 "[A] law enforcement officer may testify about statements made by others, such as victims or witnesses, when such testimony is offered not to prove the truth of the matter asserted, but instead to show 'the investigative steps taken by the officer leading to the defendant's arrest.' " *People v. Risper*, 2015 IL App (1st) 130993, ¶ 39 (quoting *People v. Pulliam*, 176 Ill. 2d 261, 274 (1997)). "This is not an exception to the hearsay rule; it is a relevant basis for admission of the testimony other than the truth of the matter asserted in those statements and, as such, is not hearsay in the first instance." *Id.* "The relevance of the testimony lies in explaining to the jury how a law enforcement investigation led to the defendant. Without such testimony, a jury might not understand how an officer got from point A to point C; it might appear to the jury that the officer had less than a valid basis for considering the defendant to be a suspect." *Id.* "Because it is not hearsay, testimony recounting the steps taken in a police investigation does not violate defendant's sixth amendment right to confront the witnesses against him." *Id.* ¶ 40.

¶ 72 Here, defendant argues that Antonio's testimony about speaking to a friend named Angel Rodriguez was "rank hearsay," and that Detective Swiderek's testimony "grossly misused" the course of investigation exception. Antonio testified that during a conversation with Rodriguez, he was told that someone known as "Little Rowdy" was bragging about the shooting on

MySpace and at Farragut High School. In response to this information, Antonio accessed the MySpace page for "Little Rowdy" and looked in a Farragut High School yearbook. Antonio then passed this information to Detective Swiderek.

¶ 73 An out-of-court statement must be offered to prove the truth of the matter asserted to qualify as hearsay. *People v. Gonzalez*, 379 Ill. App. 3d 941, 954 (2008). "[A]n out-of-court statement offered to prove its effect on a listener's mind or to show why the listener subsequently acted as he did is not hearsay and is admissible." *Id*. See also *People v. Hammonds*, 409 Ill. App. 3d 838, 854 (2011).

¶ 74 The statements by Rodriguez to Antonio were not inadmissible hearsay, but rather were used to show the effect on Antonio and provide a basis for his actions. Antonio testified that he spoke with Rodriguez over the phone and Rodriguez told him that Rodriguez knew who the shooter was. Rodriguez told Antonio that someone known as "Little Rowdy" was bragging at Farragut High School about shooting Casillas. Antonio also heard from Rodriguez that "Little Rowdy" was bragging on MySpace. Antonio then obtained access to MySpace with his cousin Bahena through the account of a woman named Gladys. Once on MySpace, Antonio found pictures of Little Rowdy and his brother on Little Rowdy's MySpace page. Antonio also obtained a copy of the Farragut High School yearbook to identify Little Rowdy. Based on our review, we find that Rodriguez's statements were not used to prove that defendant was bragging about the shooting, but to show Antonio's subsequent actions of seeking access to MySpace and obtaining a Farragut High School yearbook.

¶ 75 Defendant also contends that Detective Swiderek's testimony fell outside the course of investigation exception because he revealed the contents of each communication. Specifically, defendant refers to Detective Swiderek's testimony that another officer informed him that

Antonio told the officer about an individual called Little Rowdy bragging about the shooting on MySpace and at Farragut High School. Detective Swiderek then showed defendant's picture to Antonio and Antonio identified him as the person bragging on MySpace. Based on this information, the detective placed defendant's photograph in a photo array. Detective Swiderek also testified that he showed defendant's photo to Macias to ask if defendant was involved in the shooting. Detective Swiderek also showed Macias his own photo as well as a photo of Casillas. Macias later made an incriminating statement. Detective Swiderek did not testify that Macias identified defendant or that defendant was implicated by Macias.

¶ 76 We find the decision in *Peoples*, 377 Ill. App. 3d 978, to be relevant. There, the defendant asserted that testimony from a police detective violated the confrontation clause. The detective testified that he interviewed a codefendant and following his conversation with the codefendant, he attempted to identify the defendant in the computer database by entering a first name and that he "lived or had been arrested in the immediate area of the crime." The defendant's name and address resulted from the search and his photo was subsequently placed in a photo array. *Id*. at 981-82. The defendant argued that this testimony included the inadmissible hearsay statement from the codefendant of details of another person involved in the crime. The defendant also asserted that his counsel could not cross-examine the codefendant and the testimony bolstered a witness's account of the offense. *Id*. at 982.

¶ 77 The reviewing court reasoned that "if an out-of-court statement made by [codefendant] was offered for the purpose of proving that defendant was the gunman, the confrontation clause protects defendant's right to cross-examine [codefendant], because the confrontation clause prohibits the use of hearsay evidence." *Id*. at 983. The court concluded the testimony was not

offered for its truth, but to show the course of the police investigation leading to defendant's arrest and was not hearsay, nor did it violate *Crawford*. *Id*. at 986.

¶ 78 We also find the facts in the present case distinguishable from the cases relied on by defendant, *In re Jovan A.*, 2014 IL App (1st) 103835, and *People v. Sample*, 326 Ill. App. 3d 914 (2001). In *In re Jovan*, a bicycle was stolen and a civilian witness searched online to see if the bicycle was listed for sale. After finding a matching listing, the witness recorded the listed phone number and searched for the corresponding address. The trial court permitted the witness to testify about her search steps. *Id*. ¶¶ 26-28. On appeal, the reviewing court held that the testimony was inadmissible hearsay and that the witness was a layperson conducting a private investigation. The court noted that course of investigation exception does not apply to laypersons, but the testimony exceeded that exception as well. *Id*. ¶ 29-30.

¶ 79 In *Sample*, the prosecutor questioned the detective about the investigation. Initially, the detective testified that after speaking with one codefendant, he had a name for one suspect and a nickname for another. Later, after speaking with both codefendants, the detective stated that he was looking for the defendant as the third offender. *Sample*, 326 Ill. App. 3d at 921-23. Similar testimony was elicited from a second officer. *Id*. at 923. The defendant argued on appeal that this testimony violated his confrontation rights. The reviewing court recognized the course of investigation exception, but observed that the case involved more than a "mere suggestion" that the codefendants implicated the defendant. *Id*. The court found that the hearsay exception was violated, but any error was harmless beyond a reasonable doubt. *Id*. at 924-25.

¶ 80 We conclude no error occurred in this case. In contrast to these cases, the State did not elicit testimony to suggest that Macias had implicated defendant. The testimony that Macias was shown defendant's picture was not immediately followed by testimony that Macias gave an

incriminating statement. In fact, several questions were asked between such testimony. Further, unlike in *Sample*, the police already knew defendant's identity before speaking with Macias, the testimony did not suggest that Macias implicated defendant and was the source of his identification. Additionally, Detective Swiderek's testimony about Little Rowdy bragging about the shooting was used to explain the course of his investigation of how he learned this information and his subsequent action including placing the photograph in a photo array. We note that Detective Swiderek also testified that he included in the photo array a photograph of Barajas, another individual who reported had bragged about the shooting. Accordingly, Detective Swiderek's testimony explained the course of the police investigation and was not hearsay.

¶ 81 Defendant next argues that the he is entitled to a new trial because prosecutorial misconduct pervaded the entire trial. Defendant contends that he was denied a fair trial as a result of the prosecutors' improper comments in opening statement, introduction of inadmissible and inflammatory evidence, and improper comments during closing argument. The State responds that defendant's arguments lack merit and he was not denied a fair trial.

¶ 82 As the State points out, objections were not made to all of the comments raised on appeal from the prosecutor's opening and closing statements. To preserve an issue for review, defendant must object both at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Failure to do so operates as a forfeiture as to that issue on appeal. *People v. Ward*, 154 Ill. 2d 272, 293 (1992). In his reply brief, defendant acknowledged that he failed to preserve these claims of improper comments in the trial court, but asks this court to review them under the plain error doctrine. The supreme court has acknowledged that raising plain error in the reply brief is sufficient for review. *People v. Ramsey*, 239 Ill. 2d 342, 412 (2010).

¶ 83 Supreme Court Rule 615(a) states that "[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court." Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967). The plain error rule "allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). However, the plain error rule "is not 'a general saving clause preserving for review all errors affecting substantial rights whether or not they have been brought to the attention of the trial court.' " *Herron*, 215 Ill. 2d at 177 (quoting *People v. Precup*, 73 Ill. 2d 7, 16 (1978)). Rather, the supreme court has found that the plain error rule is a narrow and limited exception to the general rules of forfeiture. *Id*.

¶ 84 Defendant carries the burden of persuasion under both prongs of the plain error rule. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). Defendant asserts that this alleged error would qualify as a plain error under both prongs. However, "[t]he initial analytical step under either prong of the plain error doctrine is determining whether there was a clear or obvious error at trial." *People v. Sebby*, 2017 IL 119445, ¶ 49.

¶ 85 First, defendant contends that during opening statement and closing argument, the prosecutors improperly framed the shootings as a rival gang "hunting" for victims. In opening statement, defendant complains of these two remarks. The first complained-of statement:

> "It was the evening of March 19th of the year 2007. Two Latin Kings were driving in a stolen van. Two Latin Kings who drove that van deep into the territory of the Two Six Street Gang. They were stalking for victims on the streets of Chicago. They were looking for easy targets."

The second comment from opening statement was, "Ladies and Gentlemen, you will learn during this trial that the gunman of this Latin King kill team sits at this very table."

¶ 86 Later during closing and rebuttal argument, defendant complains of additional references to the hunting theme. The following comment was in closing argument.

> "On March 19th of 2007, this defendant had one thing on his mind, and that was murder. He was on the hunt for victims. He was armed with a gun. He came riding with a driver. He drove into rival territory, and he hunted for his victims."

¶ 87 During the rebuttal argument, defendant complains of the following comments.

> "It was the evening of March 19, 2007, two members of the Latin Kings were stalking the streets of Chicago. They were hunting for a victim.
>
> The two Latin Kings were working as a team, the kill team. You had a driver. You had a front seat passenger who was the gunner."

¶ 88 The final comment from this theme was, "Your guilty verdict will tell this man no more shooting on the streets of our city, of our county, of our state." Defense counsel objected to this comment, and the trial court sustained the objection. The prosecutor then closed the rebuttal argument with the following statement, "Ladies and gentlemen, find him guilty and tell him the Latin Kings don't run this town. You run this town. Find him guilty."

¶ 89 "The purpose of an opening statement is to apprise the jury of what each party expects the evidence to prove." *People v. Kliner*, 185 Ill. 2d 81, 127 (1998). "An opening statement may include a discussion of the expected evidence and reasonable inferences from the evidence." *Id.* "No statement may be made in opening which counsel does not intend to prove or cannot prove." *Id.* "The State is allowed great latitude in making the opening statement." *People v. Richmond*, 341 Ill. App. 3d 39, 47 (2003) (citing *People v. Pasch*, 152 Ill. 2d 133, 184 (1992)). "Reversible error occurs only where the prosecutor's opening comments are attributable to deliberate misconduct of the prosecutor *and* result in substantial prejudice to the defendant." (Emphasis in original.) *Kliner*, 185 Ill. 2d at 127; *People v. Risper*, 2015 IL App (1st) 130993, ¶ 27.

¶ 90 Generally, a prosecutor is given wide latitude in closing arguments, although his or her comments must be based on the facts in evidence or upon reasonable inferences drawn therefrom. *People v. Page*, 156 Ill. 2d 258, 276 (1993). "The prosecutor has the right to comment on the evidence and to draw all legitimate inferences deducible therefrom, even if they are unfavorable to the defendant." *People v. Simms*, 192 Ill. 2d 348, 396 (2000). "During closing argument, the prosecutor may properly comment on the evidence presented or reasonable inferences drawn from that evidence, respond to comments made by defense counsel which clearly invite response, and comment on the credibility of witnesses." *People v. McGee*, 2015 IL App (1st) 130367, ¶ 56. "In reviewing comments made at closing arguments, this court asks whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them." *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). "Prosecutorial misconduct warrants reversal only if it 'caused substantial prejudice to the defendant, taking into account the content and context of the comment, its relationship to the evidence, and its effect on the defendant's right to a fair and impartial trial.' "

*People v. Love*, 377 Ill. App. 3d 306, 313 (2007) (quoting *People v. Johnson*, 208 Ill. 2d 53, 115 (2004)). "If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted." *Wheeler*, 226 Ill. 2d at 123. "The trial court may cure errors by giving the jury proper instructions on the law to be applied; informing the jury that arguments are not themselves evidence and must be disregarded if not supported by the evidence at trial; or sustaining the defendant's objections and instructing the jury to disregard the inappropriate remark." *Simms*, 192 Ill. 2d at 396-97.

¶ 91 We note that there is a question of the correct standard of review for prosecutorial misconduct. Defendant cites *Wheeler* in which our supreme court suggested we review this issue *de novo*. *Wheeler*, 226 Ill. 2d at 121. However, *Wheeler* cited with approval *People v. Caffey*, 205 Ill. 2d 52 (2001), which suggested the standard of review is abuse of discretion (*Caffey*, 205 Ill. 2d at 128). *Wheeler*, 226 Ill. 2d at 122-23. Since *Wheeler*, appellate courts have been divided regarding the appropriate standard of review. *People v. Alvidrez*, 2014 IL App (1st) 121740, ¶ 26 (noting that the issue remains divided). More recently, in *People v. Cook*, 2018 IL App (1st) 142134, ¶ 63-64, the reviewing court observed that no conflict exists because both standards of review have been applied separately to appropriate issues on appeal.

> "Whereas a reviewing court applies an abuse of discretion analysis to determinations about the propriety of a prosecutor's remarks during argument ([*People v.*] *Blue*, 189 Ill. 2d [99,] 128 [2000]; [*People v.*] *Hudson*, 157 Ill. 2d [401,] 441 [1993]), a court reviews *de novo* the legal issue of whether a prosecutor's misconduct, like improper remarks during argument, was so egregious that it warrants a new trial (*Wheeler*, 226 Ill. 2d at 121). Our supreme

court has not created any conflict about the appropriate standard of review to be applied to these two different issues." *Cook*, 2018 IL App (1st) 142134, ¶ 64.

Here, the issue raised by defendant is the former, the propriety of the prosecutor's remarks, and thus, we review the comments for an abuse of discretion.

¶ 92 According to defendant, the "hunting" and "kill team" comments overstated the gang and motive evidence presented by the State because no evidence of a specific plan was presented and only Medina testified that he heard someone yell, "King." We disagree with defendant's argument because there was significant gang evidence presented at trial. Casillas, Gonzalez, and Medina were members of the Two Six gang. Gonzalez testified that Casillas made hand signs disrespectful to the Latin Kings to the occupants in the van before he was shot. Both Officer Finley and Gonzalez testified that the Latin Kings gang was a rival to the Two Six gang. Evidence was presented that defendant was a Latin King and the passenger in a stolen minivan. Both shootings took place in Two Six territory. Based on this evidence and the reasonable inferences therefrom, we find no error in the prosecutors' comments hunting for victims in a rival gang territory.

¶ 93 Defendant next asserts that the prosecutor improperly remarked in opening statement that the shootings occurred near the courthouse at 26th and California and later asked Detective Swiderek about the distance from the courthouse to the crime scenes. Specifically, during opening statement, the prosecutor stated, "And you will hear testimony where that is and how very close it is to this very building where we sit right now, ladies and gentleman." We point out that no objection was made to this statement. During Detective Swiderek's testimony, the prosecutor asked, "The address of 30th and Karlov, if you could estimate, how close is that to the building as we are here today?" Defense counsel objected, but the trial court overruled. Detective

Swiderek answered, "Four blocks. And then from California to Karlov, I don't know, maybe about 16 blocks."

¶ 94 Defendant argues that the proximity of the courthouse to crimes scenes was irrelevant and "served only to alarm the jurors by leading them to believe they were in the middle of a gang war zone." The State responds the comment and question were used to orient the jurors to the area of Chicago where the crimes occurred, not to instill fear. While defendant cites authority for the principle that the prosecutor should not appeal the fears of the jury, none of the cited cases considered whether explaining the location of the crime in relation to the courthouse was error. See *People v. Frazier*, 107 Ill. App. 3d 1096, 1101-02 (1982) (finding improper a comment referring to the jurors' " 'sisters, wives, daughters *** are going to be sitting next to somebody and you don't want them raped by that person' " where a retrial had already been ordered under a different issue and such a comment should be avoided), *People v. Crossno*, 93 Ill. 2d 808, 824 (1982) (noting that a prosecutor should refrain from making inflammatory appeals to the fears of the jury after a comment referring to the defendant as " 'judge, jury, and executioner' " of the victim, but held the comment was not reversible error), and *People v. Fluker*, 318 Ill. App. 3d 193, 202-203 (2000) (finding reversible error where "the prosecutor not only failed to throw light on the issues in the case, she actively distracted the jurors from the issues" by focusing on the jury's disapproval of gangs rather than the identification of the shooter).

¶ 95 We find no error in a single comment in opening statement and a question to Detective Swiderek about location. The prosecutor did not focus on the closeness of shootings to provoke fear, but rather indicated the proximity and moved onto other topics. We do not find these actions by the prosecutor were to inflame the jury or provoke fear. Further, contrary to

defendant's argument, Detective Swiderek's testimony indicated that the shooting was 16 blocks west and four blocks south. No suggestion was made that the courthouse was in a gang territory.

¶ 96 Next, defendant argues that the prosecutors baselessly argued that Gonzalez feared harm from defendant and the Latin Kings. Defendant complains of a line of questioning by the prosecutor during redirect of Gonzalez as well as comments made in closing and rebuttal argument. During redirect, the following colloquy occurred:

> "PROSECUTOR: Nothing is going to bring Victor back, correct? Right? That's what you just said a second ago, right? So you got to look out for yourself, isn't that true?
>
> DEFENSE ATTORNEY: Objection.
>
> GONZALEZ: What do you mean by that?
>
> PROSECUTOR: You said nothing is going to bring Victor back so you got to look out for yourself?
>
> GONZALEZ: I don't understand what you mean, I got to look out for myself.
>
> PROSECUTOR: You don't understand what that means?
>
> GONZALEZ: No. What I am saying, ain't nothing going to bring him back. Meaning that --- I mean, me being here, anything at all or me trying to harm another person or whatever is not going to bring nothing back. That's what I am trying to say.
>
> PROSECUTOR: And you have to look out for your own safety, isn't that true?
>
> GONZALEZ: Safety—

DEFENSE ATTORNEY: Objection.

TRIAL COURT: Overruled.

GONZALEZ: Safety. If I was going to go because I am in PC. [*sic*.]"

¶ 97 Following these questions, Gonzalez interjected when no question was pending, "That was really disrespectful." The trial court responded that it was not. Gonzalez replied, "Yes, it was. They are talking about my friend that passed away." Gonzalez then was excused from his testimony.

¶ 98 During closing argument, the prosecutor made the following argument.

"You see, what happened in this courtroom when [Gonzalez] came out and faced this defendant is nothing unusual. It happens frequently sadly –

DEFENSE ATTORNEY: Objection.

TRIAL COURT: Overruled. Ladies and gentlemen, you've heard the arguments in this case. Any statement made by the attorney this is not evidence or an inference was made ---inference to be made should be disregarded by you.

Continue.

PROSECUTOR: It's nothing unusual. Circumstances change. When Leonardo Gonzalez came out of the back, what he told you, ladies and gentlemen, was honestly, I don't really want to remember any of this. Because witnesses who want to be helpful and may be willing to do the right thing when the blood is fresh often do change their mind about telling the truth, about doing the right thing, and the law addresses that with this next instruction.

* * *

> His first identification of the defendant occur [*sic*] 66 days after the murder in this case. On May 24th of 2007, he views this line-up and he points to one man, that's Oscar Flores, and he tells the detective – or he tells Detective Swiderek, that's the man that shot my friend.
>
> Before he views this line-up, he is told you don't have to pick anybody out. He read that advisory. He signed that slip. He had a full understanding of what he was about to do when he viewed that line-up. There is also a different circumstance from when he testified in this courtroom when he views that line-up, he is behind a one-way mirror. He knows this defendant can't see who is identifying him."

Defense counsel objected to this statement, but the trial court overruled the objection and the prosecutor continued.

¶ 99 Finally, in rebuttal argument, the prosecutor argued as follows.

> "Let's go on a little bit about Leonardo Gonzalez. Now, where did you hear that Leonardo Gonzalez was going to be --- well, the witness that he was. We never once asked you to like Leonardo Gonzalez. He is man that shot another man in the worst place that a man could ever be shot. He is doing 38 years in the Illinois Department of Corrections. Nobody in this room understands the pressure that man is under. The motivations that he has when he testifies, when he comes out of the back in jail clothing to look at the defendant and say that he is a murderer. Where does he go back.
>
> Ladies and gentlemen, none of us know where we're gonna be in two years. Leonardo Gonzalez knows where he's going to be for the next 38.

DEFENSE ATTORNEY: Objection.

TRIAL COURT: Overruled.

PROSECUTOR: With certainty where he is going to be, the Illinois Department of Corrections. Is anybody surprised that Leonardo Gonzalez behaved in the way that he did? Do you think he's a friend of the Cook County State's Attorney's Office? Do you think he cares about the sanctity of this courtroom, about the decorum?

He is a Two Six shooter, who when he was a young man identified the shooter and murderer of his friend. Fast forward to the future, you've seen the man that he's become.

* * *

Then what about the rest of his behavior while he was on the stand. He didn't want to be a witness in this case at all. He is disavowing his previous identifications. He is blaming the victim's mother. He is making speeches from the stand. Even when he was allowed when the defense team and when I allowed him to make whatever speech, he just started going right back at it. Is that a man that is trying to tell the truth? Is that a man that's trying to right a wrong that he did to this guy? Is that a man ---what is he doing here? He is doing anything he can to get away from what he did before. He was combative to his questions. Changed his stories.

Now, remember that one that was really interesting. He was like, oh, man, I was mad at the police. You know, they didn't let me go see my little guy, and then I asked him, Are you saying that you were still mad at the police for them not

> letting you go see your guy in March, when you gave your statement in May? Is that what you're saying? And then even he realized that was ridiculous because it didn't make any sense. He was saying anything he could. And then when he got up and apologized to the defendant, he knows where he is going to be for the next 30 days."

¶ 100 Defense counsel then objected, but the trial court overruled and again instructed the jury that "any statement made by the attorneys is not evidence and should not be considered by you as such. You are the triers of fact." The prosecutor then moved onto a different topic in his rebuttal argument.

¶ 101 Defendant contends that these comments by the prosecutor as well as the questioning of Gonzalez were inflammatory and improper because "the State introduced zero evidence supporting its arguments on this point – nothing the State introduced even suggested that Gonzalez felt pressured or threatened by [defendant] or other Latin Kings." The State responds that the complained-of comments "in no way suggested that defendant threatened or intimidated the witness." The State argues that the comments properly discussed the evidence and posed inferences that Gonzalez was afraid to testify in front of the jury and "did not want to be a snitch while imprisoned."

¶ 102 We do not find the questions and comments to be error. The questions in redirect asked if Gonzalez was concerned for his own safety. None of the questions mentioned defendant, or the Latin Kings, or any threats or intimidation by them. As for the comments made during closing and rebuttal argument, the prosecutors did not refer to defendant or the Latin Kings, nor did the comments reference any intimidation or threats by them. Rather, the comments were used to explain Gonzalez's testimony and his changed stories based on his testimony and the reasonable

inferences from that testimony. As the State points out, it was a reasonable inference that Gonzalez would have a more difficult time identifying defendant as the shooter in front of him rather than behind a one-way mirror. Similarly, it was reasonable for the prosecutor to note Gonzalez's own conviction as a reason not to cooperate with the State. Given the wide latitude permitted to the prosecutors, we do not find these arguments to be prejudicial to defendant and error. These argument are supported by evidence.

¶ 103 Moreover, the trial court properly instructed the jury during the jury instructions as well as in response to some of the objections raised during closing arguments that the attorneys' arguments were not evidence. As we previously observed, "[t]he trial court may cure errors by giving the jury proper instructions on the law to be applied; informing the jury that arguments are not themselves evidence and must be disregarded if not supported by the evidence at trial; or sustaining the defendant's objections and instructing the jury to disregard the inappropriate remark." *Simms*, 192 Ill. 2d at 396-97. "Absent some indication to the contrary, we must presume that jurors follow the law as set forth in the instructions given them." *People v. Wilmington*, 2013 IL 112938, ¶ 49 (citing *Richardson v. Marsh*, 481 U.S. 200, 206 (1987)).

¶ 104 Defendant finally argues that the "pervasive" misconduct when considered cumulatively constituted reversible error and requires reversal. Defendant includes his arguments related to Macias's testimony and the alleged hearsay statements. We have already reviewed and found no reversible error in either of these claims. We disagree with defendant that there was pervasive misconduct in this case and have found no reversible errors in the claims raised by defendant. In addition, we have found no reversible errors in any of the unpreserved comments. Even if there was some error, those instances of error did not rise to the level of plain error. See *Lewis*, 234 Ill. 2d at 43.

¶ 105 Next, defendant contends that the trial court erred in allowing the State to introduce the caption on a MySpace photo in violation of this court's decision in defendant's prior appeal. The State responds that the caption was properly admitted under the doctrine of curative admissibility.

¶ 106 In defendant's first jury trial, Antonio was shown three photographs from the Little Rowdy MySpace page which included captions. "The first was a picture of defendant making gang signs with the caption 'Lil Rowdy.' The second was a photo of Casillas with a caption 'Lil Bonez Rotsk,' ***. The third photo was another picture of Casillas with the caption, 'Lil Bonez Rotsk!! hahaha 1 less Avers ... hahaha.' " *Flores*, 2014 IL App (1st) 121786, ¶ 70. Defendant had argued on appeal that the trial court erred in admitting the prejudicial photographs without proper foundation or authentication. *Id*. ¶ 66. We concluded that the photographs were properly admitted to show the course of the police investigation. *Id*. ¶ 76. However, we found:

> "the captions to the photos are prejudicial to defendant and should be redacted. It appears based upon the record before us that the State cannot prove who wrote the captions, which appear to be bragging about the victim's death, and could be attributed to defendant as a form of a confession. Although the MySpace photographs may be admitted as part of the police investigation, since the State cannot show who wrote the prejudicial captions, the captions should not be admitted at trial." *Id*. ¶ 79.

¶ 107 At defendant's retrial, the MySpace photographs were presented to witnesses with the captions redacted. However, during Detective Swiderek's redirect testimony, the State asked the detective to read the caption, "Little Bonez Rotsk" from one of the photographs. Defense counsel objected, but the trial court overruled the objection. Later, Officer Finley discussed what the

spelling of the caption meant in gang terminology. We note that defendant mistakenly argues that the trial court allowed the State to introduce the caption, "Lil Bonez Rotsk!! hahaha 1 less Avers ... hahaha." The record on appeal shows that the caption allowed at trial was "Little Bonez Rotsk."

¶ 108 Defendant asserts that the admission of this caption violated this court's prior order and the admission was not warranted under the State's reasoning of curative admissibility. Defendant maintains that the caption was even more prejudicial at this trial than the first trial.

¶ 109 "Under the doctrine of curative admissibility, a party may present inadmissible evidence where necessary to cure undue prejudice resulting from an opponent's introduction of similar evidence." *People v. Liner*, 356 Ill. App. 3d 284, 292-93 (2005). The Illinois Supreme Court has explained the doctrine of curative admissibility as: "If A opens up an issue and B will be prejudiced unless B can introduce contradictory or explanatory evidence, then B will be permitted to introduce such evidence, even though it might otherwise be improper." *People v. Manning*, 182 Ill. 2d 193, 216 (1998). "[I]n a criminal case, where the door to a particular subject is opened by defense counsel on cross-examination, the State may, on redirect, question the witness to clarify or explain the matters brought out during, or to remove or correct unfavorable inferences left by, the previous cross-examination." *Id*. "The doctrine is protective, and only shields a party from unduly prejudicial inferences raised by the other side." *People v. Mandarino*, 2013 IL App (1st) 111772, ¶ 29. "The decision to allow curative evidence lies within the sound discretion of the trial court." *Id*.

¶ 110 Here, defense counsel questioned Detective Swiderek about the investigation. Counsel specifically focused on why defendant became the target of the investigation when Barajas had been reported to the police as bragging about the shooting. After Detective Swiderek admitted

that he did not question Barajas because all he had was "a tip basically," counsel compared the tip about Barajas to being similar in substance to the information from Antonio about defendant. Counsel asked, "When Antonio Casillas gave you the MySpace page and said that Oscar Flores had been bragging about this, that was just a tip, right? He wasn't a witness?" Detective Swiderek responded, "Correct." Counsel then stated, "But you investigated that, right?" Detective Swiderek answered that he included both defendant and Barajas in photo arrays, but agreed that no positive identification was made for either one of them. After these questions, the State asked for a sidebar off the record.

¶ 111 On redirect, the prosecutor began by asking, "Detective, Counsel just asked you some questions about if, you know, the photographs and the identity of Oscar Flores were the only things you had to go on when you started to put his photographs in the photo arrays; is that true?" Detective Swiderek responded in the affirmative. The prosecutor then showed the detective the photograph with caption redacted, and then introduced an unredacted version over defendant's objection. Detective Swiderek read the caption, "Little Bonez Rotsk," and stated that it meant Little Bonez, Casillas's nickname, "Rots, rots in hell. He's dead." The exhibit was then offered into evidence and published to the jury.

¶ 112 Later, Officer Finley testified about what the caption meant in gang terminology, specifically that the "tsk" in the spelling of rot meant, "Two Six killer," and was used by the Latin Kings in the 10th district. The State did not seek to admit the other captions admitted in defendant's first trial. We note that defendant did not object to Officer Finley's testimony related to the caption. As previously observed, a defendant must object both at trial and in a written posttrial motion to preserve an issue for our review. *Enoch*, 122 Ill. 2d at 186. Failure to do so

operates as a forfeiture as to that issue on appeal. *Ward*, 154 Ill. 2d at 293. However, even if we set aside defendant's forfeiture, no error occurred.

¶ 113 Following Detective Swiderek's testimony, the trial court explained on the record that the MySpace caption was admitted after the defense counsel opened the door in her questions to Detective Swiderek. Later in denying defendant's motion for a new trial, the trial court made the following comments regarding the issue of admitting the MySpace caption.

> "In regards to Officer Swiderek in testimony, the Defense opened the door to that, so that was why they were allowed to get into questioning that the Court previously prohibited. But because the Defense made the questions and asked the questions in such a manner, they opened the door."

¶ 114 Our decision in defendant's appeal of his first trial found that the captions on three photographs should not be admitted on retrial because the State could not establish who wrote the captions and the content "could be attributed to defendant as a form of a confession." *Flores*, 2014 IL App (1st) 121786, ¶ 79. On retrial, the State sought to admit a single caption in response to defense counsel's cross-examination of Detective Swiderek which suggested that the police had no basis to focus on defendant as a suspect more than Barajas. This line of questioning opened the door for the State to set forth that the police had more information about defendant. The questions about this caption were limited in the testimony of both Detective Swiderek and Officer Finley. The testimony about the caption used by the State was to show the course of the police investigation and to explain why defendant became the focus of their investigation. Further, we point out that the trial court limited the curative testimony to one caption rather than all of the captions presented at defendant's first trial, and thus, minimized any potential prejudicial impact to defendant. Based on our review of the record, we cannot say that the trial

court abused its discretion in allowing the admission of the single caption as curative evidence when the defense opened the door to the introduction of the evidence. Even if there was error, any such error would have been harmless.

¶ 115 Since we have not remanded the case for a new trial on any of the issues raised in this appeal, we need not reach defendant's request to assign the case to a new trial judge.

¶ 116 Based on the foregoing reasons, we affirm the decision of the circuit court of Cook County.

¶ 117 Affirmed.