SIXTH DIVISION
November 17, 2017

No. 1-15-0822
2017 IL App (1st) 150822-U

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 11 CR 16170
	)	
TRINITY WALTON,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Hoffman and Justice Delort concurred in the judgment.

ORDER

¶ 1 *Held:* The State proved defendant guilty beyond a reasonable doubt despite two witnesses disavowing their prior statements at trial; trial court did not abuse its discretion in allowing witness to testify as to what he previously told police officers; trial court did not abuse its discretion in admitting evidence of defendant's possession of a firearm; and prosecution's closing arguments were not improper.

¶ 2 Following a jury trial, defendant Trinity Walton was convicted of first degree murder in connection with the shooting death of the victim, Deveus Johnson, and sentenced to 60 years in the Illinois Department of Corrections. On appeal, defendant contends that: (1) the State failed to prove him guilty of first degree murder beyond a reasonable doubt; (2) the trial court abused its discretion by admitting hearsay testimony; (3) the trial court abused its discretion by denying defendant's motion *in limine* to preclude the State from introducing into evidence that defendant

had been found in possession of bullets and a firearm; and (4) defendant was deprived of a fair trial where prosecutor made improper remarks during closing and rebuttal arguments. For the following reasons, we affirm the decision of the circuit court.

¶ 3 BACKGROUND

¶ 4 Defendant was arrested in connection with the shooting death of the victim, which took place on April 27, 2009.

¶ 5 A hearing was held prior to trial on defendant's motion to suppress certain witness statements. At the close of the hearing, the trial court noted that defendant had filed a motion *in limine* regarding evidence of a gun and bullets that had been found by police in defendant's possession after the shooting death of the victim. The parties agreed to address that motion *in limine* at the next court date. However, there is no report of proceedings for that hearing in the record.

¶ 6 A trial was held on October 29, 2014. Sergeant Christopher Kapa testified first, stating that on the date in question, he received a radio dispatch of a shooting at approximately 1:20 a.m. Sergeant Kapa testified that when he arrived at the location of the shooting, 78th and Essex, he observed two paramedics "working on a male black subject." The victim was lying on the sidewalk right next to a mailbox. Sergeant Kapa testified that there were about 50 people in the vicinity when he got there, and that they were agitated and yelling, asking the police why they did not help them faster, and screaming, "why we always show up after somebody gets shot." Sergeant Kapa put tape around the crime scene and attempted to clear an area, but the victim's brother entered the crime scene through the tape and "jumped on top of the two paramedics working on his brother." Sergeant Kapa testified that he called for assistance and then he and other officers attempted to ask the crowd for help in locating witnesses.

¶ 7 On cross-examination, Sergeant Kapa testified that only one shell casing was found at the scene, but that if an automatic weapon is shot and the shell casing is ejected, it does not necessarily have to fall in the street if it is fired from an automobile. Rather, it could fall within the car.

¶ 8 Bruce Finley testified next, stating that on the night in question he was on the corner of Essex and 78th Street, "drinking, smoking, [and] gambling." Finley stated that he had known the victim for 10 years. On the night in question, the victim was sitting on a mailbox, across the street from him. Finley testified that just after 1 a.m., "[s]omebody came and shot – pulled up to the corner and shot." Finley testified that he saw a red car pull up to the corner and saw the driver start shooting out of the driver's side of the car. He testified that the shooter was the only person in the car. Finley stated that the shooter fired about 10 shots. Finley testified that after the shooting, he went home and did not tell police what he saw. Finley testified that he was "really still scared and shocked."

¶ 9 Finley testified that he was arrested on December 8, 2009, for selling drugs to an undercover officer. The officers asked him if he had any information, and Finley told the officers he had information about the victim's murder. He told them that "I thought I saw Boo do it, and I told them that [the victim] was telling me that they got into it." Finley identified defendant in the courtroom as Boo. Finley testified that he had known defendant for over 10 years.

¶ 10 Finley testified that he met with a detective a day after his arrest and identified defendant from a photo array. Finley also testified that he met with a detective and an assistant State's Attorney on December 11, 2009, at which point he told them that defendant had shot the victim from a red car. Finley testified that his friend Chico was also outside during the shooting, standing by his van, but that he had since been murdered.

¶ 11 Finley further testified that he told a detective and an assistant State's Attorney that defendant shot the victim from a red car, but "I wasn't sure. I told them I wasn't sure." He stated that he was drunk on the night of the victim's shooting. He also stated that he was intoxicated on December 8, 2009, when he was arrested for selling drugs to an undercover police officer, and that he was still drunk the next day, as well as on December 11, 2009.

¶ 12 Finley testified that he was called back in to the police station to discuss the murder on January 10, 2011. He spoke to two detectives and a different assistant State's Attorney. Finley testified that he told them defendant shot the victim from a red car. Finley also gave a recorded statement at that time stating that defendant shot the victim.

¶ 13 Finley testified at trial that he was "drunk and I was scared, and like, I was running for my life ***. I'm saying, I was telling [the assistant State's Attorney] I wasn't sure." The video of defendant was then played for the jury. Finley testified that while he never stated on the video that he was intoxicated or that he was not sure if defendant shot the victim, he had told the detectives and the assistant State's Attorney.

¶ 14 Finley was then asked if he was scared to testify in court, to which Finley replied "Yeah." Finley also admitted that on March 23, 2011, he told the grand jury that defendant shot and killed the victim. He did not tell the grand jury he was intoxicated.

¶ 15 On cross-examination, Finley testified that he agreed to speak to the police the night of his arrest because he wanted to have the drug case taken care of. Finley testified that he had two prior convictions for possession of a controlled substance. Finley testified that he assisted the police in the murder investigation because he did not want to get another conviction for possession of a controlled substance, and that he was not in fact ever convicted after his arrest on December 8, 2011. Finley testified that the case was resolved before he talked to the grand jury.

¶ 16 Finley further testified on cross-examination that on the night of the murder he consumed "a fifth" of Cognac and smoked about 10 "blunts." He testified that as he sat in court, he did not know who the shooter was that killed the victim. When asked if the shooter was defendant, Finley replied, "No." Finley testified that he did not know who shot the victim.

¶ 17 On redirect examination, Finley testified that he does not still live in the neighborhood where this all happened, but that his family still does. He stated that he does not go back because he is scared.

¶ 18 Sergeant George Karuntzos testified next. He stated that he arrested Finley on December 8, 2009, in response to a narcotics complaint in the area. Sergeant Karuntzos stated that in reaction to violent acts like shootings and homicides, his officers attempt to make purchases. Then they bring the subject in, debrief them, and ask if they know any type of information in regard to violent acts that have taken place. Sergeant Karuntzos testified that after speaking with Finley on December 8, 2009, he sent him home. Finley was never charged in the narcotics incident. Sergeant Karuntzos testified that he never threatened Finley with going to jail if he did not provide Sergeant Karuntzos with information about the murder.

¶ 19 Police officer Assata Olugbala testified next. She stated that on May 3, 2009, she was working as a tactical officer in the area of 78th Street and Essex. Officer Olugbala testified that she had information on a homicide that had occurred, so she went to the area to try to "gain intel on the murder that occurred the week before." A man by the name of Jason Hall approached her, knowing she and her partner were police officers. Hall is now deceased.

¶ 20 Shacoya Albert testified that she was living in the area of 78th and Essex in April 2009, with her boyfriend, James Robinson, who is now deceased. On the night of the murder, there were several people outside, but she only knew Robinson, who was also known as "Chico." At

some point in the night, Shacoya got in her boyfriend's van and then heard gunshots. She got out of the van and saw a crowd around. The crowd dispersed when the ambulance arrived, and she went up to her apartment. She did not see where Robinson went.

¶ 21 Shacoya testified that on July 5, 2010, she was arrested for a warrant on a case that was already pending. On that date, she also was charged with possession of a misdemeanor amount of cannabis. She was taken to the police station and asked about the murder in question. Shacoya testified that she did not remember if she told detectives that she saw defendant driving a red Ford Thunderbird on the night in question, and saw him shoot from the window of the car.

¶ 22 Shacoya was asked whether she was shown a photo array on the day of her arrest. She stated that she had been shown pictures. When confronted with a photo array, with her signature, Shacoya stated that she recognized her signature but did not remember signing the form. When shown a document with defendant's picture circled, and her initials next to it, Shacoya stated that she did not remember seeing that document or initialing it. Shacoya testified that Robinson was killed on July 2, 2009.

¶ 23 Mike Clarke testified next, stating that he was an assistant State's Attorney in Cook County. On July 6, 2010, he received a call at 2 a.m. about a witness with information about a homicide. He went to the police station and met with Shacoya Albert. She did not appear to be under the influence of drugs or alcohol. Clarke testified that he spoke to Shacoya for about 30 minutes, at which time she agreed to allow Clarke to write down her statement. As Shacoya described the shooting of the victim, Clarke wrote it down in front of her. Clarke testified that the signatures on the bottom of each page of the recorded statement represented Shacoya's, his own, and Detective Luke Connolly's.

¶ 24 Shacoya's written statement was then read aloud to the jury. It stated in pertinent part the following. After being advised by Clarke that he is a lawyer and a prosecutor, Shacoya agreed to give the statement. Shacoya stated that she knew the person in the picture presented to her as the victim, and has known him for about two years. She stated that she was at the corner of 78th and Essex on the night of the shooting, standing with a girl named Jameka and at least five or six other people. Shacoya stated that the victim and her boyfriend, James Robinson, were hanging out on the corner at that time. She stated that Robinson had a white van that was parked on 78th, facing west towards Essex. Shacoya and Jameka then went in the white van. A few minutes later, she saw a red Thunderbird pull up on 78th, coming from the east. Shacoya stated that at this time, she was seated in the front passenger seat of the van and Jameka was in the driver's seat. Shocoya stated that the victim was sitting on the mailbox, talking with other people. There was only one person in the red Thunderbird. The car pulled up right in front of the white van and the driver slowed down and looked at her and Jameka before pulling in front of the van.

¶ 25 Shacoya stated that the street lights were bright enough that she could see the face of the driver, and she recognized him from around the neighborhood but did not know his name. Detective Connolly showed her a photo array today and she identified the driver of the car. She circled his picture and put her initials next to it.

¶ 26 Shacoya stated that the driver of the red car pointed a gun at the group of guys near the mailbox and fired approximately five or six times. Shacoya stated that the victim fell to the ground and the red car sped off. She did not tell the police what she saw at that time because there was a large crowd and she was afraid of retaliation from the neighborhood.

¶ 27 Shacoya acknowledged that no one made any threats or promises to her in exchange for her statement, and that her statement had nothing to do with her arrest for the possession of

cannabis. She stated that she was not under the influence of drugs or alcohol and that she gave the statement freely and voluntarily.

¶ 28 Officer Marcin Kazarmowicz testified next. He stated that on June 23, 2009, he was working with his partner, Officer Christian Ramirez. They received a dispatch for shots fired, as well as a description of a car. The officers saw a vehicle matching that description shortly thereafter and stopped it. Officer Kazamowicz identified defendant as the occupant of the vehicle. His partner recovered a gun from defendant's right-hand pocket as he was stepping out of the vehicle. Officer Kazamowicz identified a picture of the semi-automatic pistol that was recovered from defendant at that time. There were three rounds of ammunition in the gun at the time it was recovered.

¶ 29 Diana Pratt, an expert in firearms identification, testified next. She testified that she worked for the Illinois State Police, Forensic Science Center in Chicago. She received a nine-millimeter Ruger fired cartridge case from the scene of the shooting as well as the recovered Ruger semi-automatic nine-millimeter pistol with three unfired cartridges. Pratt testified that she was unable to form a definitive conclusion regarding whether or not the single recovered cartridge case was fired from the recovered firearm. Pratt stated that such a finding was not uncommon, and that she simply did not have sufficient evidence to identify or eliminate the recovered cartridge case as having been fired from the firearm.

¶ 30 Detective Luke Connolly testified next. He stated that on the night of the shooting, he was working with his partner, Sergeant Meador. They were dispatched to 78th and Essex to investigate the shooting. Detective Connolly testified that when they arrived on the scene, there were bloodstains on the sidewalk and a defect in the mailbox consistent with a strike from a

bullet. There was also a cartridge case recovered from the street. The cartridge case was from a nine-millimeter weapon and was expended.

¶ 31 Detective Connolly stated that after some investigation, he issued an investigative alert for Jason Hall. After he had a conversation with Hall, he issued investigative alerts for Shacoya Albert, Jason Brown, and Robert Hayes. Detective Connolly spoke to Bruce Finley on December 11, 2009, at which time Finley identified defendant as the shooter of the victim and the driver of the red car on the night in question. Detective Connolly stated that Finley was not hesitant in his identification.

¶ 32 Detective Connolly testified that he spoke to Shacoya on July 5, 2010, after her arrest. She told Detective Connolly that she observed defendant drive up in a red Ford Thunderbird and defendant looked into the van from his car. He testified that Shacoya told him that defendant drove to the corner and started shooting. Shacoya told him she called 9-1-1 when she realized the victim had been shot. She did not know defendant's name, but identified him in a photo array. Detective Connolly contacted Michael Clarke, an assistant State's Attorney, who agreed to meet with Shacoya and memorialize her statement.

¶ 33 Detective Connolly stated that on December 16, 2010, Jason Hall, who was incarcerated, wanted to speak to him about the victim's murder. After speaking with Hall, Detective Connolly called defendant and asked him to come in to the station. Defendant complied and agreed to be interviewed. The interview was videotaped. This videotaped statement was shown in court, but is not included in the record on appeal.

¶ 34 After the initial conversation, Detective Connolly left the station to investigate and returned later to speak to defendant. This conversation was again videotaped and shown to the jury. Detective Connolly testified that he learned that a red Thunderbird was registered to

Johnika Lowe. Defendant told Detective Connolly that the car had been in an accident and totaled, but Detective Connolly's investigations revealed that the city of Chicago had not towed the vehicle. Detective Connolly was unable to locate the red Thunderbird.

¶ 35 Detective Connolly testified that defendant claimed that on the night in question he was with his uncles, Lincoln and Richard Bowman, both of whom Detective Connolly was able to talk with. They each consented to handwritten statements about what they were doing the night of the shooting, and defendant was released without charge.

¶ 36 Richard Bowman testified that on the night in question, there was a family party in honor of his dead brother, Trinity Bowman (defendant's father), who had died on April 26, 1991. Richard testified that he did not attend the party because he had a toothache. He lived with his brother, Lincoln. Defendant had been staying with them, along with defendant's girlfriend, Johnika, and their two kids. He testified that he saw defendant and Lincoln leave the house at around dusk. He did not remember if Johnika left the house that evening. At some point in the night, he saw Lincoln arrive home, and then went back to bed. When he woke up the next morning, defendant was in the house with Johnika.

¶ 37 Lincoln Bowman testified next. He stated that on the night in question, he and defendant went to his sister's house, then back to his home, and then to the area of 74th and Colfax. There was a gathering there of about 50 people. People were in and out of a house, including defendant. They were mingling and drinking, and he left at around 1 or 2 a.m. Lincoln testified that defendant left with him and they drove back to his house.

¶ 38 Lincoln admitted that he told the assistant State's Attorney that he woke up the next morning in his home, but did not remember how he got there because of how much tequila he had to drink.

¶ 39 Detective Edward Killeen testified next for the State. He testified that spoke to Lincoln and Lincoln agreed to have his statement reduced to writing. The statement was read in court and stated that Lincoln celebrated his brother's birthday every year by "going someplace to kick it and drink." Lincoln stated that on the night in question, he celebrated his brother's birthday at 74th and Colfax with a bunch of people. Lincoln stated that he was drinking, and that from time to time he saw defendant. Detective Killeen testified that Lincoln told him that he was very drunk and drove himself home at some point, but he "doesn't remember anything about how he got home and doesn't remember driving because of how much tequila he had to drink."

¶ 40 The parties then stipulated that if called, Dr. Tera Jones, an assistant medical examiner, would testify that she performed a postmortem examination on the victim. Dr. Jones would testify that her opinion within a reasonable degree of medical and scientific certainty that the cause of the victim's death was a gunshot wound to the back.

¶ 41 The State then introduced into evidence a certified vehicle record for a Ford 1994 Thunderbird registered to Johnika Lowe.

¶ 42 The jury found defendant guilty of first degree murder and personally discharging a firearm that proximately caused death. At sentencing, defendant called his wife and mother in mitigation. Defendant had five prior felony convictions. The trial court sentenced defendant to 35 years in prison on the first-degree murder conviction, and 25 years for personally discharging a firearm.

¶ 43 ANALYSIS

¶ 44 On appeal, defendant contends: (1) the State failed to prove him guilty of first degree murder beyond a reasonable doubt; (2) the trial court abused its discretion by admitting hearsay testimony; (3) the trial court abused its discretion by denying defendant's motion *in limine* to

preclude the State from introducing into evidence that defendant had been found in possession of bullets and a firearm; and (4) defendant was deprived of a fair trial where prosecution made improper remarks during closing and rebuttal arguments.

¶ 45 Proof Beyond Reasonable Doubt

¶ 46 Defendant's first contention on appeal is that the State failed to prove him guilty beyond a reasonable doubt where the only evidence linking him to the crime was testimony by two witnesses who during trial disavowed their prior statements at trial. The State responds that it was within the province of the jury to determine the weight afforded the evidence, the credibility of the witnesses, and to draw reasonable inferences therefrom. We agree with the State.

¶ 47 When a defendant challenges the sufficiency of the evidence, it is not the function of the reviewing court to retry the defendant. *People v. Hall*, 194 Ill. 2d 305, 329-30 (2000). A reviewing court must determine 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. *People v. Young*, 128 Ill. 2d 1, 49 (1989). "This standard of review applies in all criminal cases, whether the evidence is direct or circumstantial." *People v. Gilliam*, 172 Ill. 2d 484, 515 (1996). We will not reverse a conviction unless the evidence is so unreasonable, improbable, or unsatisfactory that it raises a reasonable doubt of defendant's guilt. *Hall*, 194 Ill. 2d at 330.

¶ 48 It is the function of the jury to assess the credibility of the witnesses, the weight to be given their testimony, and the inferences to be drawn from the evidence. *Gilliam*, 172 Ill. 2d at 515. We will not substitute our judgment for the that of the trier of fact on questions involving the weight to be assigned the evidence or the credibility of the witnesses. *People v. Campbell*, 146 Ill. 2d 363, 375 (1992). Defendant's arguments regarding the sufficiency of the evidence are

unpersuasive because the weaknesses in the evidence that defendant cites on appeal were all presented to, and rejected, by the jury. See *People v. Baugh*, 358 Ill. App. 3d 718, 737 (2005).

¶ 49 By its verdict, the jury determined that Shacoya Albert and Bruce Finley were telling the truth when they made prior statements to both the police and the grand jury, and that they were lying at trial. See *People v. Morrow*, 303 Ill. App. 3d 671, 677 (1999); *People v. McBounds*, 182 Ill. App. 3d 1002, 1014 (1989) (trial court found witnesses' prior inconsistent statements more trustworthy than their trial testimony); *People v. Zizzo*, 301 Ill. App. 3d 481 (1998) (looking at witnesses' two statements in the light most favorable to the prosecution, court can presume from jury's verdict that jury found the prior statement to be more trustworthy). Previous inconsistent statements are properly admitted under section 115-10.1 of the Code of Criminal Procedure (725 ILCS 5/115-10.1 (West 2008)). *Morrow*, 303 Ill. App. 3d at 677. If a prior statement meets section 115-10.1's test, a "finding of reliability and voluntariness is automatically made. Accordingly, no additional analysis is needed. *** [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. 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 such analysis." (Emphasis in original.) *People v. Curtis*, 296 Ill. App. 3d 991, 999 (1998).

¶ 50 We therefore find that Shacoya's and Finley's prior inconsistent statements constituted sufficient evidence to support defendant's conviction. Their statements met the requirements of section 115-10.1 where they were inconsistent with their testimony at trial, and they were subject to cross-examination about the statements by defense counsel. Their statements made to law

enforcement and the grand jury were properly admitted as impeachment where they each claimed to not remember what happened on the night of the shooting or who the shooter was. Moreover, their prior statements corroborated each other's statements. We conclude that their prior statements, which were properly before the jury, when viewed in a light most favorable to the State, could lead a rational trier of fact to conclude that Finley and Shacoya lied on the witness stand, but told the truth in their prior statements. We find nothing here to justify substituting this court's judgment for that of the jury in weighing the testimony.

¶ 51 Defendant's reliance on *People v. Parker*, 234 Ill. App. 3d 273 (1992), and *People v. Arcos*, 282 Ill. App. 3d 870 (1996), does not convince us otherwise. In *Arcos* and *Parker*, both of which the court in *Curtis* declined to follow, the court found that there was not sufficient evidence to support the trier of fact's finding that the witnesses' prior statements were not coerced and were voluntary. Here, there were no allegations of coercion regarding the prior inconsistent statements. In fact, the jury viewed Finley's videotaped statement, and therefore had the opportunity to evaluate Finley's credibility firsthand. Shacoya's prior statement, which had been reduced to writing, was also read aloud to the jury. Accordingly, we find *Arcos* and *Parker* to be inapposite to the case at bar.

¶ 52 Hearsay Testimony

¶ 53 Defendant's next argument on appeal is that the trial court abused its discretion when it admitted testimony that Finley told police that defendant had "got into it" with the victim and that the victim had shot at defendant on a previous occasion. The State maintains that the evidence was not admitted for the truth of the matter asserted, but instead to establish what Finley told the officer, which was not hearsay evidence. The State further argues that even if the trial court erred in allowing the testimony, such error was harmless.

¶ 54 Evidentiary rulings are within the sound discretion of the trial court and will not be reversed unless the trial court has abused that discretion. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court. *Id*. The trial court must consider a number of circumstances when deciding whether to admit evidence, including questions of reliability and prejudice. *Id*.

¶ 55 Hearsay is an out-of-court statement offered to establish the truth of the matter asserted, and testimony about an out-of-court statement that is used for a purpose other than to prove the truth of the matter asserted in the statement is not hearsay. *People v. Banks*, 237 Ill. 2d 154, 180 (2010). "The fundamental basis for excluding such a statement is the lack of an opportunity to test the credibility of the statement through cross-examination." *People v. Crowe*, 327 Ill. App. 3d 930, 937 (2002).

¶ 56 In the case at bar, the State maintains that Finley's testimony was not offered for the truth of the matter asserted, but rather to establish what Finley told police, and why the police began to investigate defendant as a possible suspect. The following colloquy took place at trial:

> "Q: What did you tell police about why [defendant] shot [the victim]?
>
> A: Because I told them I was talking to [the victim] for some days, and he said he was into it with [defendant], they were arguing, they had an argument, and they was into it.
>
> Q: Did you even – did you tell police that you heard [defendant] might have been shot at by [the victim]?
>
> [Defense counsel]: Objection.
>
> THE COURT: He can tell the jury what he told the police.

A: Yes, I heard that.

THE COURT: But I ask you to not lead the witness. Ask another question.

A: I heard that.

Q: Did you tell the police that?

A: Yes.

* * *

Q: When you're talking to the police, you're telling them, I think I know why [defendant] killed [the victim], that it was in retaliation for [the victim] shooting at [defendant]?

[Defense counsel]: Objection, leading.

THE COURT: You may answer.

A: Yes."

¶ 57 As stated above, hearsay statements are not allowed because of the lack of opportunity to cross-examine the declarant. *Crowe*, 327 Ill. App. 3d at 937. In this case, Finley was the declarant, and he was certainly subject to cross-examination. Moreover, where an out-of-court statement is offered for the limited purpose of explaining the reason the police conducted their investigation as they did, the testimony is not objectionable on the grounds of hearsay. *People v. Sanders*, 80 Ill. App. 3d 809, 814 (1980). Here, Finley was testifying as to what he told the police, which is what initiated the search for defendant as a suspect. The State did not seek to admit Finley's statements to prove that defendant was guilty. Instead, Finley's testimony provided context for the police investigation. See *People v. Harrison*, 238 Ill. 2d 74, 102 (2010) (detective's testimony that he told defendant that defendant's sister thought he was guilty was not hearsay because State did not seek to admit sister's statements to prove defendant was guilty.

Instead, testimony was introduced to provide context for the investigation and for testimony pertaining to defendant's state of mind).

¶ 58 Evidence of Firearm in Defendant's Possession

¶ 59 Defendant's next argument on appeal is that the trial court abused its discretion in admitting evidence that defendant had been found in possession of bullets and a firearm that was the same caliber as the firearm used in the shooting. The State responds that the trial court did not abuse its discretion in admitting the challenged evidence.

¶ 60 It is within the trial court's discretion to decide whether evidence is relevant and admissible. *People v. Hayes*, 139 Ill. 2d 89, 130 (1990). A trial court's decision concerning whether evidence is relevant and admissible will not be reversed absent a clear abuse of discretion. *Id*. An abuse of discretion will be found only where the trial court's decision is "arbitrary, fanciful or unreasonable" or where no reasonable person would take the trial court's view. *People v. Illgen*, 145 Ill. 2d 353, 364 (1991). Evidence is considered relevant if it has any tendency to make the existence of any fact that is of consequence to the determination of an action either more or less probable than it would be without the evidence. *Id*. at 365-66. However, a trial court may reject evidence on the grounds of relevancy if the evidence is remote, uncertain or speculative. *People v. Cloutier*, 156 Ill. 2d 483, 501 (1993). For the reasons that follow, we cannot conclude that the trial court's ruling admitting the evidence of the firearm in defendant's possession at the time of his arrest was so arbitrary, fanciful or unreasonable that no reasonable person would take the view adopted by the trial court.

¶ 61 At trial, testimony established that a nine-millimeter fired cartridge case was recovered from the scene of the shooting. Evidence also showed that defendant was arrested on June 23, 2009, in possession of a nine-millimeter caliber firearm. The forensic scientist with a

specialization in firearms testified that she was unable to form a definitive conclusion regarding whether the single cartridge case was fired from the recovered firearm. However, the expert stated that this result was not uncommon because there was not sufficient evidence to identify or eliminate the recovered weapon.

¶ 62 While defense counsel filed a motion *in limine* seeking to bar the admission of the testimony regarding the firearm recovered from defendant, the record on appeal does not contain a transcript of the proceedings on that motion. However, the following sidebar occurred at trial, with the trial court stating:

> "We had one other sidebar. That's about the admissibility of the police officer from the 25th District talking about recovering a gun from [defendant].
>
> We talked about this quite some time ago, in pretrial. An objection was timely made and renewed today. This is not in the classic nature of proof of other crimes evidence. I don't want the jury to consider that as such.
>
> What was done here, the gun was recovered from him. It had all kinds of similarities to what appeared to be the murder weapon in this case.
>
> The police investigated it. The detectives requested the state police lab to make the examination. The examination went where it went. It is up to the jury to decide what to do about that.
>
> I do acknowledge here some prejudicial value out there. I believe the probative value of this evidence, we talked about this, outweighs the prejudicial value. The jury has the right to know everything the police did, how thorough they were in their investigation, trying to tie together evidence. It came back as it did. Quite a few similarities between the casing recovered and the gun recovered

> from [defendant]. All be it [sic] not enough for her to make a positive identification and say they both were tied to each other.
>
> So, I want the jury to know about that, about what the police did, how thorough their investigation was. I don't want them to consider this in the nature of proof of other crimes. I intend to give a limiting instruction to the jury about this. I'll invite input from the lawyers how you would like me to articulate that."

¶ 63 The general rule is that physical evidence may be admitted provided there is proof to connect it with the defendant and the crime. *People v. Free*, 94 Ill. 2d 378, 415 (1983). "It is only necessary that the object at least be suitable for the commission of the crime [citation], but it is not necessary that the object actually be used in committing the crime." *Id*. It is not necessary for the State to prove that the weapon was the one actually used in the crime [citation]. *People v. Dinwiddie*, 299 Ill. App. 3d 636, 645 (1998). Here, even though the forensic scientist could not conclusively establish that the firearm recovered in defendant's possession was the one used in the murder, we find that a reasonable jury could conclude that the nine-millimeter firearm was connected to the crime, especially in light of the fact that the spent cartridge found at the scene of the shooting was from a nine-millimeter firearm. We find that the trial court did not abuse its discretion in allowing the testimony regarding the firearm into evidence.

¶ 64 Closing and Rebuttal Arguments

¶ 65 Defendant's final issue on appeal is that the prosecution denied him a fair trial when it made improper remarks during both closing and rebuttal arguments. Specifically, defendant takes issue with: (1) the State's characterization that Finley and Shacoya recanted their prior testimony due to fear of retaliation or intimidation, and (2) the State's shifting of the burden to defendant to prove his own innocence.

¶ 66 As an initial matter, defendant concedes that he has forfeited review of several of the complained-of comments by failing to make a contemporaneous objection, and failing to include them in his post-trial motion. *People v. Woods*, 214 Ill. 2d 455, 470 (2005) (a "defendant must both specifically object at trial and raise the specific issues again in a posttrial motion to preserve any error for review.") When a defendant has failed to preserve an error for review, we may still review for plain error. *People v. Piatkowski*, 225 Ill. 2d 551, 562-63 (2007). Under the plain-error doctrine, this court will review forfeited challenges when either a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scale of justice against the defendant, or a clear or obvious error occurred and the error is so serious that if affected the fairness of the defendant's trial and the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Taylor*, 2011 IL 110067, ¶ 30. "The first step in a plain error analysis is to determine whether error occurred." *People v. McDonald*, 2016 IL 118882, ¶ 48. "Absent reversible error, there can be no plain error." *Id.*

¶ 67 A prosecutor has wide latitude in making a closing argument and is permitted to comment on the evidence and any fair, reasonable inferences it yields. *People v. Nicholas*, 218 Ill. 2d 125, 139 (2005). Prosecutors may not argue assumptions or facts not contained in the record. *People v. Kliner*, 185 Ill. 2d 81, 151 (1998). A closing argument must be viewed in its entirety, and the challenged remarks must be viewed in their context. *People v. Buss*, 187 Ill. 2d 144, 244 (1999). Statements will not be held improper if they were provoked or invited by the defense counsel's argument. *People v. Kirchner*, 194 Ill. 2d 502, 553 (2000). With these rules in mind, we consider defendant's arguments.

¶ 68 (1) Recanted Testimony

¶ 69 Defendant first takes issue with the prosecutor's statement during closing argument that Shacoya and Finley recanted their prior testimony because they were afraid of retaliation. Specifically, defendant first points to the following statement made in initial closing arguments by the prosecutor: "There's a couple words that I want you to consider now that you have actually heard all of the evidence. Some [of] those words are intimidation, fear of retaliation, and something that's very important[,] the truth." This statement was not objected to. Later, the prosecution stated, "[T]he law recognizes that things change over time. People get scared. People for whatever reason may be in fear; People forget things. You've all heard that statement that snitches get s[t]itches." The objection to this statement was overruled. The State went on to argue that, "the Defendant has a right to confront his witnesses but when [the witnesses] are in the room they clam up. *** [Finley] forgot exactly why he was here. He didn't want to tell you for whatever reason but you know now what he was really telling you. You could read through the lines what was being said." Defense counsel's objection was again overruled.

¶ 70 In context, however, the following arguments were made by the State:

> "Now with respect to the witnesses, this is very important because you're going to hear Shacoya Alberty and Bruce Finley you got an opportunity to examine them as to whether or not these individuals or this is [the] individual that committed that murder. You need not look further than the way they sat in that chair. We'll talk about Bruce Finley first. Bruce Finley was quiet. He answered everyone's questions. And he looked terrified to be here. In fact, he told all of you he was terrified to be here.
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> He testified that he remembered most of what happened on that day but he tried to escape most of the responsibility by saying I was drunk. I was high. I

don't know actually what I saw 5 years after the fact. But you know now because I just read the instruction about the law recognizes that things change over time. People get scared. People for whatever reasons may be in fear. People forget things. You've heard that statement that snitches get s[t]itches.

[Defense counsel]: Objection.

THE COURT: Overruled.

[Assistant State's Attorney]: And for some reason the mentality of the people in the neighborhood was they didn't want to cooperate with the police. Imagine that. Imagine that an individual is gunned down a few feet from his house in front of all of his friends and you heard from every one of those officers not one person walked up to the police and was willing to tell them what happened. That's the situation the police are dealing with. The police are doing their job.

You might ask yourself why even do their job, why even to continue to investigate this case when no one's willing to do it because that is their job. Their job is to figure out the truth about what happened and they did. They followed the investigation as my partner told you for almost two years. They followed each track. They got all the witnesses in, and they spoke to them. And you can consider the statement that Bruce Finley gave to the grand jury and on that video as if it came from that witness stand.

That's what the Legislature recognizes. That for whatever reason when they come here and they get scared and they are confronted or the Defendant has a right to confront his accusers but when they are in the room, they clam up. Bruce Finley –

[Defense counsel]: Objection.

THE COURT: Overruled.

[Assistant State's Attorney]: Forgot exactly why he was here. He didn't want to tell you for whatever reason but you know now what he really was telling you. You could read through the lines what was being said.

[Defense counsel]: Objection.

THE COURT: Overruled."

¶ 71 We find that the prosecutor's comments were not made in error in this case. Rather, when viewed in context, they were based on evidence presented in this case and legitimate inferences drawn therefrom. During Finley's testimony, he testified that he "was really still scared and shocked," and "scared of the fact that [he] was out there when that happened." He stated that he was "just still real frightened." When specifically asked what he was scared of, Finley replied, "I'm just scared about the whole – this whole situation." The prosecutor asked, "Are you scared about testifying in court?" Finley replied, "Yeah." Additionally, Shacoya noted in her handwritten statement that she did not tell the police what she had seen the night of the shooting because she "was afraid of retaliation from the neighborhood." Testimony also established that the crowd was agitated on the night of the shooting, and that police officers were unable to locate an eyewitness despite the amount of people in the area on the night of the shooting.

¶ 72 Defendant's reliance on *People v. Mullen*, 141 Ill. 2d 394 (1990), *People v. Ray*, 126 Ill. App. 3d 656 (1984), and *People v. Fluker*, 318 Ill. App. 3d 193 (2000), do not persuade us that the prosecutor's comments were improper. In *Mullen*, a witness indicated in chambers that he was afraid to testify because of "some boys around the house." 141 Ill. 2d at 398. The parties were then admonished not to ask questions or reference why the witness was reluctant to testify.

Id. In closing argument, the prosecutor specifically stated that a witness was afraid of being shot in the back if he testified against defendant. This was done despite the trial court excluding any mention of the witness's fear of defendant. As explained in *People v. Williams*, 192 Ill. 2d 548, 574-75 (2000), "there was no evidence in the record that defendant in any way threatened or intimidated any witness." In the case at bar, there was evidence presented, by the witnesses themselves, that they were afraid to testify, and that they were afraid to talk to the police.

¶ 73 In *Ray*, the prosecutor suggested that the witnesses chose not to speak with the defense counsel or testify because they were afraid of the defendant and that defendant was "working through the lawyers to intimidate you in the courtroom." 126 Ill. App. 3d at 662. This comment was not based on any evidence actually presented at trial. Moreover, the court found reversible error, not based on that comment, but rather, based on "a litany of remarks so vituperative and inflammatory that they could only have created an atmosphere inimical to the even-handed dispensation of justice and thus resulted in prejudice to defendant." *Ray*, 126 Ill. App. 3d at 659-60. The court noted the prosecutor's repeated attacks on the professional integrity of defense counsel, charging defense counsel with lying 16 times, trying to confuse and intimidate the jury, and comments about defendant's failure to testify. *Id*. at 661-63. These facts are wholly inapposite to the case at bar.

¶ 74 Similarly in *Fluker*, the court did not base its decision to reverse and remand the case for a new trial on the prosecutor's remarks about intimidation or fear of retaliation. Rather, the court noted that the prosecutor "turned the jury's attention away from the issues in an effort to turn the case into a referendum on attitudes towards gangs." 318 Ill. App. 3d at 202-3. The prosecutor also improperly shifted the burden of proof to defendant in rebuttal. *Id*. In the case at bar, the

complained-of comments were directly based on facts that were presented through witness testimony, and therefore not improper.

¶ 75 (2) Burden Shifting

¶ 76 Finally, defendant contends that the prosecutor improperly shifted the burden of proof during rebuttal closing arguments to defendant. Specifically, defendant takes issue with the following passage, which was not objected to:

> "How ridiculously improbable that all of these things that point to the Defendant's guilt do not establish that he is guilty. They are all an unfortunate coinciden[ces] that befell the Defendant Trinity Walton, merely a coincidence. When a person is innocent when they are not guilty, nothing points to their guilt. Building and things anomalies of the universe, maybe one thing points [to] their guilt.
>
> Let's build a margin for error for the Defendant, two things might point to his guilt. The evidence in this case is damning not just from the witnesses but from the physical evidence but from the Defendant's own words. You had an opportunity to see his interview. *** He buried himself with his own words. Everything points to guilty. It's not just that he's identified by Shacoya and Bruce Finley. It's not testimony that he just happened to be driving by."

¶ 77 While it is impermissible for the prosecution to attempt to shift the burden of proof to the defense, once a defendant does present certain evidence it is not beyond the reach of appropriate comment by the prosecution. *People v. Phillips*, 127 Ill. 2d 499, 527 (1989) ("There is a great deal of difference between an allegation by the prosecution that defendant did not prove himself innocent and statements questioning the relevance or credibility of a defendant's case.") Here,

during closing arguments, defense counsel argued that there was insufficient evidence to prove defendant guilty. Defense counsel stated that the police did not return to the scene to recover evidence, that the red Thunderbird would have left tire tracks, and that the alleged eyewitness testimony was not corroborated. The prosecution's remarks in rebuttal were in response to defense counsel's characterization of the evidence. See *People v. Evans*, 209 Ill. 2d 194, 225 (2004) (counsel may comment upon defense characterizations of the evidence or case and when defense counsel provokes a response, the defendant cannot complain that the prosecutor's reply denied him a fair trial).

¶ 78 Moreover, even if we were to find that these comments in rebuttal closing arguments were made in error, they would not rise to the level of plain error because this case was not closely balanced nor was the alleged error of such magnitude that the defendant was denied a fair trial.

¶ 79 CONCLUSION

¶ 80 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 81 Affirmed.