SECOND DIVISION
JUNE 30, 2011

1-09-0893

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. 07 CR12418
	)	
KENDRICK BUTLER	)	Honorable
	)	Rosemary Higgins-Grant,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

Held: Defendant was not deprived of a fair trial or denied effective assistance of counsel because of alleged errors by the trial court and his defense counsel. However, his sentences for two counts of murder for only one victim are vacated and the cause is remanded to the trial court for resentencing.

Following a jury trial, the defendant, Kendrick Butler, was convicted of two counts of first degree murder of Gregory Dugar. The two counts were: (1) intentional or knowing murder, in that the defendant either intended to kill or do great bodily harm to the victim, or knew that his acts would cause death to the victim (720 ILCS 5/9-1(a)(1) (West 2006)) (count I) for which he received a 50-year term of imprisonment; and (2) with the same intentional or knowing mental state, the

defendant proximately discharged a firearm causing the death of the victim (720 ILCS 5/9-1(a)(1) (West 2006)) (count V) for which he received a sentence of 30 years to be served consecutively to the first sentence, for a total of 80 years of imprisonment.

The defendant raises the following issues on appeal: (1) whether he was deprived of a fair trial and denied effective assistance of counsel because the trial court allowed numerous inadmissible statements into evidence that cumulatively were highly prejudicial to him; and, further, his trial counsel failed to object to most of the improper evidence; and (2) whether the trial court improperly imposed sentences for two counts of first degree murder when there was only one victim.

For the following reasons, we affirm the judgment of the circuit court of Cook County, but vacate the defendant's sentences and remand the case to the circuit court for resentencing.

BACKGROUND

The following facts were established at the defendant's January 2009 trial. At approximately 8 p.m. on May 3, 2006, Paul Allen was driving his car with Kyesha Kohnke as a passenger in the front seat and Brian Smith and the victim as passengers in the back seat. Allen stopped at a stop sign at the intersection of Maypole and LaCrosse Avenues in Chicago. As Allen drove away from the intersection, approximately five shots were fired at the back of his car. Allen and Kohnke testified that they did not see who fired the shots. The victim later died of a gunshot wound to his head.

At trial, three of the State's witnesses recanted previous statements that they had made regarding the defendant's involvement in the crime. None of the State's witnesses gave trial testimony which implicated the defendant. There was no physical evidence from the crime scene that linked the defendant to the crime.

One of the State's witnesses at trial was Eric Robertson, who had a prior felony conviction for the manufacture and delivery of a controlled substance. Robertson testified that on the evening in question, he was driving in Chanell Richmond's car with her and Tremaine Brown. They were celebrating Brown's birthday. Robertson admitted at trial that he had smoked marijuana that evening. Although the three of them went to a liquor store, he did not drink alcohol. Richmond drove to the intersection of Maypole and LaCrosse Avenues, where Robertson got out of the car to talk to Derrick Young. Robertson testified at trial that from that point on, he did not remember anything further about the evening. He did not remember talking with Chicago police detectives or an assistant state's attorney or to a grand jury about events surrounding the shooting.

The State called Bonnie Greenstein, an assistant state's attorney, who accompanied Robertson to testify to a grand jury in June 2007. Robertson was incarcerated at the time of his grand jury testimony. Robertson's grand jury testimony was admitted into evidence at trial. In that testimony, Robertson admitted talking with Chicago police detectives on May 6, 2006. He initially told the police that he was not in the area of Maypole and LaCrosse Avenues where the shooting took place on May 3, 2006. Later in the interview with police, Robertson admitted that he was in the vicinity on the night in question. Robertson stated he was standing on the corner with Young when he heard a gunshot. He then looked toward the direction of the shot and saw the defendant "shooting inside" the rear of a red, four-door car. According to Robertson's statement to police, the defendant was standing behind the car and there were no shots fired besides those fired by the defendant. Robertson viewed a photographic line-up at the police station and identified the defendant as the shooter. Robertson agreed that the facts he testified to at the grand jury hearing

were the same facts he told the police at the police station on May 6, 2006. When he made the statements to the police and grand jury, he denied being under the influence of drugs or alcohol.

Detective Victor Kubica testified for the State that, along with detective Sean Forde, he initially interviewed Robertson on May 6 and 7, 2006. In their initial interview at the police station, Robertson said that he was scared and did not want to become a "snitch." On October 4, 2006, Robertson, who was incarcerated, was transported to the police station for another interview. At that time, Robertson told Kubica that he was "stupid" to have initially assisted the police with the murder investigation.

State's witness Tremaine Brown, who had four prior felony convictions, testified that he was in the car with Robertson and Richmond at approximately eight p.m. on May 3, 2006. He got out of the car at the corner of Maypole and LaCrosse Avenues where Young and others were gathered. Brown saw the defendant arrive a short time later. He noticed a maroon car that contained three men and one woman approach the intersection. Brown testified that he did not remember anything that happened after that.

Detectives Kubica and Forde testified that Brown was arrested on May 5, 2006, as a suspect in this crime. While Brown was being detained at the police station, he was videotaped stating that on the night in question he saw the defendant shoot into the rear of a car and then flee in the opposite direction. Brown said that he and the defendant were members of the Mafia Insane street gang. In a photographic line-up at the police station Brown identified the defendant as the shooter.

Assistant state's attorney Art Heil testified that he took Brown's handwritten statement on September 28, 2006. In that statement, Brown said that earlier in the day of the shooting, he heard

from someone that the defendant had been "jumped," or beaten, by some members of the Four Corner Hustlers street gang. Contrary to the gang affiliation that he had indicated in his videotaped statements, Brown said in his handwritten statement that he was a member of the Black P Stone street gang. Brown stated in the handwritten statement that the defendant was a member of the Mafia Insane Vice Lords street gang, Robertson was a member of the Black Disciples street gang and Young was a member of the Conservative Vice Lords street gang.

On the evening of the shooting, Brown saw the defendant near some bushes at Maypole and LaCrosse Avenues. Brown, Robertson and Young were across the street from the defendant. Near the intersection, Brown saw a maroon car that he recognized as belonging to a member of the Four Corner Hustlers street gang. The car contained three males and one female. Brown saw the defendant come out from behind the bushes and walk into the street behind the car. Brown saw that the defendant had a handgun which he fired at the rear of the maroon car. Brown said the defendant fired his gun about five or six times. Brown saw the male in the back passenger's seat of the car slump down. The car drove off and the defendant ran westward on Maypole Avenue.

Brown did not comply with a subpoena to appear before a grand jury on October 9, 2006. Kubica testified that in a telephone conversation with Brown on October 10, 2006, Brown said, "They're going to kill me in the neighborhood," and then hung up the telephone. Brown appeared before a grand jury on October 27, 2006. Assistant state's attorney Francisco Lamas testified regarding Brown's grand jury testimony, which was consistent with his handwritten statement taken on September 28, 2006. Brown stated in his grand jury testimony that he had heard on the day in question that the defendant had been beaten by a member of the Four Corner Hustlers street gang and

that, "I guess [the defendant was going] to retaliate by any way he could, but he had a gun."

Shawn Jenkins, who had several felony convictions and was incarcerated at the time of trial, denied speaking with the defendant a week after the shooting. Jenkins denied that the defendant stayed at his residence for a period of time in 2006. Jenkins also denied telling police about statements which the defendant made to him regarding the shooting.

Kubica testified that he received information on October 22, 2006, that Jenkins had been arrested on an unrelated warrant. Jenkins claimed he had information regarding the shooting. Kubica and Forde interviewed Jenkins. No deals were made with Jenkins for the information. Jenkins told Kubica that he was on the corner of Fulton and LaCrosse Avenues[1] on May 3, 2006, when he heard four or five shots. He immediately left the area because he feared for his safety. He did not see the shooter.

Jenkins told Kubica that the defendant had called him from a bus station one week after the shooting. The defendant said that he wanted to go to Minnesota because he had been in an altercation with some individuals. The defendant did not have any money and asked if he could stay at Jenkins' residence. The defendant stayed with Jenkins until September 2006. Jenkins also told Kubica that the defendant admitted that he retrieved a handgun from an alley behind LaCrosse Avenue and fired four or five shots into a vehicle that the defendant thought contained individuals with whom he was involved in an earlier altercation. Jenkins stated that the defendant told him that he may have fired at the wrong individuals. Jenkins also told Kubica that he overhead a telephone

[1]This intersection is one block north of the intersection where the shooting occurred.

conversation between the defendant and an individual named Ken. The defendant told Ken to get rid of the gun which the defendant had used in the shooting.

Jenkins signed a written statement which memorialized his conversation with the detectives. Assistant state's attorney Mary Innes testified regarding the contents of Jenkins' written statement that she drafted and Jenkins signed on October 23, 2006. Jenkins and the defendant were both members of the Vice Lords street gang. Assistant state's attorney Lamas testified that he accompanied Jenkins during his grand jury appearance on the morning of October 23, 2006. Jenkins' testimony was consistent with his previous statements. A grand juror asked, "Do you know the intended victim of what gang [the defendant] thought he was shooting at? Jenkins replied, the "Mafia Insanes."

Kubica testified that on February 8, 2007, the police learned that the defendant was in police custody on an unrelated matter in Cedar Rapids, Iowa. On May 10, 2007, Kubica and another detective traveled to Iowa and arrested the defendant for the crime in question.

The defendant was charged with four counts of first-degree murder and one count of aggravated discharge of a firearm. The jury convicted him of two counts of first-degree murder. The defendant filed a motion for a new trial which the trial court denied.

The trial court considered the heinous nature of the crime and the defendant's background during the sentencing hearing. The trial court imposed a sentence of 50 years of imprisonment for conviction on count I of the indictment which charged first-degree murder in that the defendant either intended to kill or do great bodily harm to the victim; or he knew that his acts would cause death to the victim. The trial court also sentenced the defendant to a term of 30 years of

imprisonment on count V, which charged the same intentional or knowing mental state with the allegation that the defendant discharged a firearm proximately causing the victim's death. The two sentences were to be served consecutively, for a total of 80 years of imprisonment. The defendant filed a timely appeal of his conviction and sentence. Ill. S. Ct. R. 606 (eff. Mar. 20, 2009).

ANALYSIS

The defendant's first issue on appeal is whether he was deprived of a fair trial and the effective assistance of counsel where his trial counsel failed to object to what the defendant contends was inadmissible hearsay evidence, repetitive prior witnesses' inconsistent statements, irrelevant evidence and evidence of other crimes. We note that a reviewing court will overturn a trial court's decision regarding whether to admit evidence only when the record clearly demonstrates that the trial court abused its discretion. *People v. Lara*, 402 Ill. App. 3d 257, 265, 932 N.E.2d 1052, 1059 (2010). "An abuse of discretion occurs when the judge's ruling is arbitrary, fanciful, or unreasonable, or when no reasonable person would take the same view." *People v. Robertson*, 312 Ill. App. 3d 467, 469, 727 N.E.2d 404, 406 (2000) (citing *People v. Illgen*, 145 Ill. 2d 353, 364, 583 N.E.2d 515, 519 (1991)).

A defendant in a criminal trial has a constitutional right to effective assistance of counsel. U.S. Const., amends. VI, XIV. In order to successfully prove that he has been deprived of this right, a defendant must show: (1) that his trial counsel's representation fell below an objective standard of reasonableness; and (2) that there is a reasonable probability that, but for counsel's inadequate performance, the outcome of his trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-94 (1984). The review of the issue of whether a defendant has been denied effective

assistance of counsel involves a mixed question of fact and law. We defer to the trial court's findings of fact, but will review *de novo* the legal question of whether trial counsel's performance supports the defendant's claim of ineffective assistance of counsel. *People v. Davis*, 353 Ill. App. 3d 790, 794, 819 N.E.2d 1195, 1200 (2004).

The defendant first contends that the witness Jenkins' oral and written statements to police and the state's attorney should not have been admitted into evidence. The defendant points out that Jenkins was not a witness to the shooting. At trial, he denied making the oral and written statements at the police station that were later admitted into evidence. In the statements, Jenkins stated that a week after the shooting, he spoke with the defendant by telephone. The defendant told him that he wanted to leave town because he had been involved in an altercation. The defendant said that he did not have any money and asked Jenkins if he could stay at Jenkins' home. Further, according to the statements, the defendant admitted to Jenkins on two occasions that he shot into a car containing people that he thought he had previously fought with. Jenkins' statements also related that he overheard a conversation during which the defendant asked a person named Ken to get rid of the gun used by the defendant in the shooting.

At trial, the defendant did not object to the admission of Jenkins' prior statements and did not include the issue in his posttrial motion. The State argues that the defendant has forfeited this issue. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124, 1130 (1988).

The defendant argues that this court should review the issue under the plain error rule, which allows a court of review to consider unpreserved errors. The plain error doctrine applies when: (1) a clear or obvious error, regardless of the seriousness of the error, occurred where the evidence was

so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) the clear or obvious error was so serious 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, 564-65, 870 N.E.2d 403, 410 (2007) (citing *People v. Herron*, 215 Ill. 2d 167, 186-87, 830 N.E.2d 467, 479-80 (2005)). The burden of persuasion is on the defendant to show that either one of the two prongs applies to his case. *Piatkowski*, 225 Ill. 2d at 565, 870 N.E.2d at 410 (citing *Herron,* 215 Ill. 2d at 187, 830 N.E.2d at 480). The State strenuously argues that the trial court did not err in allowing Jenkins' statements into evidence. The State alternatively argues that if there was error, it did not rise to the level of plain error.

We note at the outset that a review of the record reveals that the evidence in this case was not closely balanced. The State's evidence included the statements of two eyewitnesses who unequivocally identified the defendant as the shooter. Therefore, we will review all issues which were not preserved by the defendant under the second prong of the plain error rule.

The defendant argues that the trial court erred in admitting Jenkins' statements because: (1) the statements were inadmissible as substantive evidence under section 115-10.1 of the Code of Criminal Procedure of 1963 (the Code) (725 ILCS 5/115-10.1 (West 2008)) since Jenkins lacked personal knowledge of the shooting; and (2) the statements were inadmissible for impeachment purposes because Jenkins' trial testimony did not affirmatively damage the State's case. The defendant argues that because Jenkins was the only witness whose testimony included statements of the defendant's admission to having committed the crime, he was undeniably prejudiced by this hearsay evidence.

Hearsay is an out-of-court statement that is offered for the truth of the matter asserted and is generally inadmissible at trial. *People v. Brooks*, 297 Ill. App. 3d 581, 583, 697 N.E.2d 343, 345 (1998). In criminal cases in Illinois, evidence of a witness' prior statement is not inadmissible under the hearsay rule if:

> "(a) the statement is inconsistent with [the witness'] testimony at the hearing or trial, and
>
> (b) the witness is subject to cross-examination concerning the statement, and
>
> (c) the statement--
>
> (1) was made under oath at trial, hearing, or other proceeding, or
>
> (2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and
>
> (A) the statement is proved to have been written or signed by the witness, or
>
> (B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing or other proceeding, or
>
> (C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar

electronic means of sound recording." 725 ILCS 5/115-10.1 (West 2008).

The defendant argues that portions of the oral and written statements Jenkins made to the police and the state's attorney that contained admissions by the defendant that he shot the victim should not have been admitted into evidence because Jenkins did not have personal knowledge of the shooting, as required under paragraph (c)(2) of section 115-10.1 of the Code. The defendant contends that even though the jury was given the proper jury instruction that mirrors the language of section 115-10.1, the jury needed additional guidance from the court regarding the subtle distinction to be made regarding whether a statement made by a third-party to a witness could be used as substantive evidence.

In testing admissibility of a statement, the State argues that the personal knowledge of the witness turns on whether the witness is passing along a comment that substantively narrates or describes an event (asserted for the truth that the event occurred) or whether the witness is simply relaying a comment that does not contain substantive information (not asserted for the truth of the event). *People v. Martin*, 401 Ill. App. 3d 315, 320, 927 N.E.2d 877, 881 (2010). If the statement consists of what a witness heard, but does not narrate or describe an event, then the personal knowledge requirement is met. *Id*. at 320, 927 N.E.2d at 881-82. The State then argues that "much" of the substance of Jenkins' statement did not narrate or describe an event and therefore, the personal knowledge requirement was met.

The defendant further argues that the admission of the statements into evidence is impermissible because the State cannot impeach its own witness. In order for the State to impeach

its own witness with prior inconsistent statements, the State must show that the witness' trial testimony affirmatively damaged the State's case, as opposed to just failing to support it. *People v. Miller*, 302 Ill. App. 3d 487, 493, 706 N.E.2d 947, 952 (1998).

The State argues that Jenkins' trial testimony did, in fact, affirmatively damage its case. The State points to Jenkins' trial testimony in which he said that his conversation with the assistant state's attorney was "[n]ot out of my own will" and that he gave answers that the *police told him to give*. Similarly, Jenkins further testified that he gave testimony to the grand jury because the *police told him to.* Thus, his testimony at trial questioned the voluntary nature of his previous statements, as well as the veracity and conduct of the officers who investigated the murder. We agree with the State that this is clearly damaging to the State's case. Therefore, we conclude that the trial court correctly allowed Jenkins' prior inconsistent statements into evidence as an exception to the hearsay rule, for impeachment purposes.

The State also points out that, assuming *arguendo*, some of Jenkins' prior statements were erroneously allowed into evidence, Jenkins made the same statements during his grand jury testimony and that was properly admitted into evidence pursuant to section 115-10.1(c)(1). 725 ILCS 5/115-10.1(c)(1) (West 2008). Therefore, the jury would have heard the same statements even if Jenkins' police station testimony was not admitted. We agree. See *People v. Sims*, 285 Ill. App. 3d 598, 610, 673 N.E.2d 1119, 1127 (1996). Accordingly, there was no plain error by the trial court on this issue.

The next issue that the defendant raises is that the trial court erred in allowing numerous prior inconsistent statements of three of the State's witnesses that implicated the defendant in the crime.

Each of the three witnesses denied making the prior inconsistent statements. The State offered: (1) Robertson's prior police station statements and grand jury testimony; (2) Jenkins' oral and written police station statements and his grand jury testimony and (3) Brown's videotaped and written police station statements and his grand jury testimony. The defendant argues that this repetitive evidence should have been barred by the trial court. Because defense counsel did not object to the admission of the statements, nor was this issue included in the defendant's posttrial motion, this issue must also be reviewed under the plain error standard.

The defendant's argument that prior consistent statements unfairly bolster a witness' credibility since a trier of fact is more likely to believe something that is repeated is misplaced. *People v. Montgomery*, 254 Ill. App. 3d 782, 792, 626 N.E.2d 1254, 1261 (1993). The defendant argues that because section 115-10.1 of the Code allows for inconsistent statements to be admitted as substantive evidence, the introduction of multiple, similar, prior inconsistent statements likewise confers an unfair advantage on the party advocating the acceptance of the evidence. The defendant argues that section 115-10.1 only relaxes the hearsay rule barring inconsistent statements and does not alter the common law rule against prior consistent statements.

The defendant acknowledges that an argument similar to the one he is advancing was rejected in the case of *People v. Johnson*, 385 Ill. App. 3d 585, 898 N.E.2d 658 (2008). In that case, the court stated that the consistency of a witness' prior statements must be measured against the witness' trial testimony. *Id*. at 608, 898 N.E.2d at 679. "The rule against admission of consistent statements exists because they needlessly bolster the witness's trial testimony. [citations]. Obviously, inconsistent statements cannot bolster a witness's trial testimony. Thus, application of the rule

makes no sense here." *Id.* The defendant claims that the *Johnson* decision was "ill-reasoned and should not be followed. *** The effect of the holding in *Johnson* is that the reliability of one form of substantive evidence (*i.e.*, an out-of-court statement) may be bolstered without limit, while another form of substantive evidence (trial testimony) cannot be bolstered by evidence that such witness said the same thing previously."

The defendant then cites cases where repetitive or cumulative testimony was found to be prejudicial to the defendant. The cases cited by the defendant do not involve repetitive prior *inconsistent* statements and are misplaced in the context of this case. We decline to depart from the reasoning in the *Johnson* case. See also *People v. Santiago*, No. 1-09-3202, slip op. at 9 (Ill. App. May 13, 2011); *People v. Maldonado*, 398 Ill. App. 3d 401, 423, 922 N.E.2d 1211, 1229 (2010).

Our review of the record leads us to conclude that the trial court did not abuse its discretion by allowing into evidence, the prior inconsistent statements of uncooperative witnesses. Therefore, we conclude that no error, much less plain error, was committed by the trial court.

The defendant next argues that the trial court erred in allowing into evidence the testimony of Fadia Akarabawi, a law clerk who worked with Kim Ward, the prosecutor at the defendant's trial. Defense counsel objected to this testimony at trial and this issue was included in the defendant's posttrial motion. Akarabawi testified regarding a conversation she had with Ward and the witness Tremaine Brown the day before the trial. We will examine whether the trial court abused its discretion by allowing this testimony into evidence.

On the witness stand, prosecutor Ward asked Brown during trial whether he had spoken with her and her law clerk Akarabawi the day before in the hallway outside of the courtroom. Brown

answered that he did have a conversation with the two of them. When asked if he stated that he was "going to be a man and testify to the truth today?" he said that he did not remember that part of the conversation. Ward further pressed Brown to tell the jury whether he had told her that he was "going to be a man and *** get up on the stand and tell the truth?" Brown again stated that he did not remember that part of the conversation. The trial court then allowed the prosecutor to put Akarabawi on the witness stand. Akarabawi testified that she was present for the conversation with Brown and the prosecutor a day earlier. The State claims that Akarabawi's testimony regarding the hallway conversation with Brown was necessary to impeach Brown.

The defendant claims that the testimony of Akarabawi allowed the prosecutor to "practically testify herself, in violation of the advocate-witness rule." That rule states that an attorney is prohibited from acting as both advocate and witness during a trial. *People v. Blue*, 189 Ill. 2d 99, 136, 724 N.E.2d 920, 940 (2000). The defendant relies on the *Blue* case for support. There, the Illinois supreme court ruled that the defendant had been deprived of a fair trial because of continual trial errors. Two prosecutors who had interviewed one of the State's witnesses on an unrelated case later were the prosecutors at the defendant's trial. There were hostile exchanges between the witness and the prosecutors regarding the witness' testimony. The supreme court concluded that the prosecution injected its own testimony through thinly veiled objections. *Id*. at 134-35, 724 N.E.2d at 939. The supreme court noted that the advocate-witness rule "is particularly pertinent to prosecutors in criminal cases because of the sensitive role they assume as the government's representative in the court room." *Id*. at 136, 724 N.E.2d at 940.

In this case, the State argues that Akarabawi's testimony was necessary to impeach Brown.

The defendant points out that in the prosecutor's rebuttal closing statement, she reiterated Brown's out-of-court statement made to her and Akarabawi. The record shows that the trial court gave the jury the proper instruction, specifically, that the prosecutor's comments in closing argument are not evidence.

Our review of the record leads us to conclude that this testimony did not violate the advocate-witness rule. Accordingly, we conclude that the trial court did not abuse its discretion by allowing evidence of the conversation between Akarabawi and Brown for impeachment purposes.

The next issue the defendant raises is that the State improperly elicited hearsay testimony that Brown heard from an unidentified person that the defendant had been beaten by a member of a certain gang prior to the shooting. This testimony was contained in Brown's oral and written police station statements and in his grand jury testimony. The defendant argues that "[t]his evidence was particularly prejudicial because it was the most pointed evidence of an explanation or motive for the shooting." The defendant claims that evidence of the defendant's possible motive was "crucial, especially where the State's case was hampered by its witnesses' serious credibility problems and where no one identified [the defendant] in open court as the shooter."

As the State correctly notes, the defendant did not preserve this issue by objecting at trial, or including it in his posttrial motion, so it must also be reviewed under the plain error doctrine. As we have noted, in order for this court to find plain error, we must find error.

The defendant argues that the portion of Brown's statements which included what the defendant characterizes as double hearsay, or hearsay-within-hearsay, was inadmissible and should have been redacted by the State. In order for this type of evidence to be properly admitted into

evidence, an exception to the prohibition against hearsay must be applicable to each level of testimony. See *People v. Thomas*, 178 Ill. 2d 215, 687 N.E.2d 892 (1997).

The defendant relies upon the case of *People v. Radovick*, 275 Ill. App. 3d 809, 656 N.E.2d 235 (1995), where the court reversed the defendant's murder conviction based, in part, on the trial court's failure allow the defendant's request to redact improper statements from a witness' grand jury testimony. In that case, the appellate court held that although the trial court had broad discretion to admit testimony pursuant to section 115-10.1 of the Code, this discretion did not allow the State to admit "wholly irrelevant or unfairly prejudicial evidence." *Id*. at 820, 656 N.E.2d at 243. The appellate court found that there was a "host of information contained in the grand jury testimony which should have been excluded and which had the tendency to unfairly prejudice the defendant's case." *Id*.

In this case, the State distinguishes the *Radovick* case because defense counsel did not request that any portion of the witnesses' grand jury testimony be redacted. The State admits that the defendant's claim that portions of Brown's testimony is inadmissible hearsay-within-hearsay "might be true." However, the State argues against the defendant's suggestion that "a trial court must, *sua sponte*, order the prosecution to redact any potentially objectionable statements from *** otherwise admissible evidence without so much as a single objection from the defendant regarding that evidence." The State contends that even if this was error on the part of the trial court, the defendant's claim must fail because neither prong of the plain error doctrine is satisfied.

Our review of the record discloses that the alleged hearsay statements were part of overall testimony from a non-cooperating witness. The defendant did not request redaction, and the trial

court had no duty to order such redaction *sua sponte*. Accordingly, the trial court did not err on this issue and the defendant's argument fails.

The next issue that the defendant raises is that the State caused evidence of "other crimes" by the defendant to be admitted into evidence by eliciting testimony that the defendant was arrested while he was in police custody in Iowa for an unrelated matter. The defendant argues that this testimony had nothing to do with the investigation of the crime and had no probative value with respect to his guilt in this case. The defendant urges that this unnecessary testimony suggested to the jury that the defendant had a propensity to commit crimes and therefore encouraged the jury to convict him because he was a bad person deserving of punishment. See *People v. Thingvold*, 145 Ill. 2d 441, 452, 584 N.E.2d 89, 93 (1991). The defendant did not object to this evidence at trial, nor did he include this issue in his posttrial motion. Further, we note that the record does not disclose that the defendant's attorney filed a motion *in limine* to prevent any reference at trial to this fact. Accordingly, the defendant has forfeited this issue and it can only be reviewed under the plain error rule as previously discussed with most of the issues raised by the defendant.

The State argues that this evidence was a part of Kubica's testimony outlining the course of the police investigation. The defendant was identified as the shooter in this case in a photographic line-up in May 2006. He was not taken into police custody in Iowa until May 2007. The State makes a persuasive argument that the lengthy delay between these dates needed to be explained to the jurors to allay any doubts regarding police diligence and the certainty of the witnesses' identifications.

Further, the State points out that no reference was made to a particular crime, if any, that the

defendant was accused of committing when he was apprehended in Iowa. This court has recognized that similar testimony is allowable "although it suggested other criminal activity, because it was relevant to the circumstances of the arrest and was part of a continuing narrative." *People v. Fauntleroy*, 224 Ill. App. 3d 140, 148-49, 586 N.E.2d 292, 297 (1991). The decision to admit evidence of other crimes is within the discretion of the trial court and is proper as part of a narrative that explains the circumstances of the defendant's arrest. *Id*. at 148, 586 N.E.2d at 297.

In the instant case, there was no testimony regarding "other crimes" committed by the defendant, only testimony explaining the circumstances of the police investigation leading to the defendant's arrest for the crime in this case. Therefore, the trial court did not commit error in allowing the testimony regarding the circumstances leading to the defendant's arrest.

The next issue advanced by the defendant is that the State improperly introduced into evidence the fact that two guns, neither of which were linked to this crime, were recovered from the witness, Jenkins' residence. Police officer Ron Bialota testified that in October 2006, during the execution of a search warrant unrelated to this case, two firearms and an unspecified amount of cannabis were recovered from Jenkins' home. After Jenkins was arrested, he told Bialota that he had information about the shooting involved in this case. Defense counsel objected at first to the introduction of the testimony about the recovered firearms, but then withdrew the objection. However, this issue was included in the defendant's posttrial motion.

The defendant argues that this evidence was prejudicial to him because it could have suggested to the jury that he and Jenkins were dangerous people who may have used the guns in other offenses; thus, the jury could have concluded that the defendant was worthy of punishment.

The defendant further advances the theory that the jury may have inappropriately used the evidence of Jenkins' guns when weighing his credibility. The defendant argues, moreover, that the testimony regarding the guns was unnecessarily lengthy and detailed.

Forensic evidence at trial showed that a bullet recovered from the car in which the victim was shot and the bullet recovered from the victim's head were fired from the same weapon. A bullet fragment was also recovered from the victim's head, but it could not be identified or eliminated as having been fired by the same gun as the other two bullets.

The State initially argues that this issue has been forfeited by the defendant because he withdrew his objection during trial, and even though he included the issue in his posttrial motion, both an objection at trial and inclusion in a posttrial motion are needed to preserve the issue. We agree that this issue has been forfeited. Therefore, once again, this issue must be examined under the plain error rule. As we have noted, in order for there to be plain error, we must find that there is error.

The State argues that the testimony regarding the two firearms found in Jenkins' home was relevant and important to its case. The State contends that the issue of Jenkins' credibility was repeatedly attacked by the defendant. Further, part of the defendant's theory at trial was that there was a conspiracy among the witnesses to blame the defendant for the crime that one of the witnesses actually committed. The State argues that these attacks on Jenkins' credibility made it necessary for the State to present evidence supporting his credibility and eliminating any suggestion that he was involved in the shooting.

Defense counsel argued during closing argument that Jenkins was charged "with two pieces

and marijuana," and Jenkins must have thought, "Well, I got to get out of here. What am I going to do?" Defense counsel suggested that Jenkins, Brown and Eric Robertson "got together and concocted this story. If one of these guys got arrested, they would lay if off on [the defendant]." Therefore, the State argues, the defendant cannot say that the evidence of two firearms owned by Jenkins, and shown by forensic evidence to be unrelated to this case, was prejudicial to him. In fact, defense counsel used the evidence as part of a theory explaining why the State's witnesses were incriminating the defendant.

We agree with the State that the cases upon which the defendant relies do not lend support to his argument. In the case of *People v. Yelliott*, the appellate court reversed a defendant's conviction because of the improper admission into evidence of a gun not used in the crime that was never in the possession of the defendant; further, the prosecutor erroneously represented to the jury that the gun had been used by the defendant in the crime. *People v. Yelliott*, 156 Ill. App. 3d 601, 602-03, 509 N.E.2d 111, 112-13 (1987). Here, there was no connection made by the State between Jenkins' guns and the defendant. Similarly, the other case relied upon by the defendant does not support his argument. See *People v. Babiarz,* 271 Ill. App. 3d 153, 160, 648 N.E.2d 137, 143-44 (1995).

We conclude that the evidence of the confiscation and examination of two firearms, unrelated to the crime, was not prejudicial to defendant. The trial court did not commit plain error by allowing this evidence at trial.

The next issue the defendant raises is that the trial court should not have allowed testimony regarding the witnesses' fear of retaliation for testifying against the defendant because that testimony

unfairly suggested a link to the defendant. The record discloses that Brown's prior out-of-court statement that "[t]hey're going to kill me in the neighborhood" was allowed into evidence. Robertson's prior out-of-court statements that he didn't want to be a "snitch" and that he had been "stupid" to cooperate with the police were also allowed into evidence. However, the record discloses no evidence at trial that linked the defendant to any threats or retaliation against the witnesses.

Defense counsel objected at trial to testimony that Brown made the statement that he would be killed in his neighborhood. Objection to this testimony was also included in the defendant's posttrial motion. Thus, we will review the issue relating to Brown's statement under an abuse of discretion standard. However, we will review the issue regarding Robertson's statements, not included in the defendant's posttrial motion, under a plain error standard since this issue was not properly preserved for appeal.

The State argues that these statements were properly allowed into evidence to show the witnesses' states of mind and to impeach the witnesses. Both witnesses testified at trial that they did not remember talking to the detective who testified regarding these statements. The State argues that the statements were not offered to be used substantively by the jury, but rather, to explain the witnesses' non-cooperation with the State.

The requirements for proper admission of an out-of-court statement that describes a declarant's state-of-mind is: "(1) the declarant is unavailable to testify, (2) there is a reasonable probability that the proffered hearsay statements are truthful, and (3) the statements are relevant to a material issue in the case." *People v. Munoz*, 398 Ill. App. 3d 455, 479, 923 N.E.2d 898, 918-19 (2010). In this case, although the declarants were present at trial, they were uncooperative, and the

State points out that it was important to present evidence of possible motives for their lack of cooperation.

The defendant claims that he was prejudiced when the prosecutor implied in closing argument that the witnesses would not tell the truth at trial because the defendant was present in court and was staring at them. According to the defendant, the prosecutor also implied that Jenkins was afraid of the defendant as evidenced by Jenkins' refusal to provide his address in open court. On the contrary, the record reveals that no evidence was offered at trial which connected the defendant with any threats or actions which would cause the witnesses to be uncooperative. The prosecutor, like the defendant's attorney, is allowed during closing argument to highlight inferences from the evidence. The jury was properly instructed as to the prosecutor's comments made during closing argument.

We hold that the trial court did not abuse its discretion in allowing Brown's statements into evidence. We further conclude that the trial court did not commit plain error by allowing Robertson's statements into evidence.

The defendant next argues that, "[a]lthough each of the errors [raised throughout his appeal] is sufficiently egregious on an individual basis to have denied [him] a fair trial, this Court should also consider the cumulative effect of the errors to determine if collectively, they denied the defendant a fair trial." See *People v. Johnson*, 208 Ill. 2d 53, 62, 803 N.E.2d 405, 410 (2003). The defendant notes that "[t]he State correctly acknowledges that defense counsel objected to virtually none of the evidence at issue in this appeal." The defendant argues that this fact supports his argument that his defense counsel was ineffective. The defendant argues that it was entirely

unreasonable for his defense counsel to "sit idly while the State introduced an abundance of improper evidence in this case."

The defendant continues to argue that although he has forfeited virtually every issue that he now raises on appeal, the State's case against him was not overwhelming and the errors should be reviewed under the plain error rule. First, the defendant urges this court to evaluate the cumulative errors committed by the trial court and his defense counsel which, when viewed in light of what the defendant claims is closely balanced evidence, likely tipped the scales of justice against him. Second, the defendant alternatively argues that the errors in his case were of such magnitude that they affected the integrity of the trial. See *People v. Wheeler*, 186 Ill. App. 3d 422, 427, 542 N.E.2d 524, 527 (1989).

We reject these arguments. The record shows that the evidence in this case cannot be characterized as closely balanced. Therefore, only the second prong of the plain error rule requiring a finding of errors which were so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, would be applicable. The alleged errors which the defendant raises on appeal do not satisfy that standard.

The defendant's claim that he was deprived of his right to effective assistance of counsel must also fail. The defendant has not shown, under the two-pronged *Strickland* test discussed throughout this opinion, that his trial counsel's representation fell below an objective standard of reasonableness, and without the alleged inadequate performance of trial counsel, the jury's verdict would have been different. We conclude that the errors which the defendant alleges occurred, even if found to have truly been errors, would not have altered the outcome of the trial. Accordingly, we

reject the defendant's claim of ineffective assistance of counsel.

The last issue that the defendant raises is that the trial court erred in sentencing him on convictions for two counts of first-degree murder when there was only one decedent. The trial court imposed a sentence of 50 years of imprisonment on count I of the indictment for first-degree murder. That charge required the defendant's intentional or knowing mental state. The trial court also imposed a consecutive sentence of 30 years of imprisonment on count V of the indictment for first degree murder. That charge also required that the defendant possess an intentional or knowing mental state and that he personally discharged a firearm that proximately caused the victim's death.[2] The indictment and notice of appeal indicate that both counts were based upon the same statutory provision. 720 ILCS 5/9-1(a)(1) (West 2006).

It is well established that when there is only one murder victim, there can only be one conviction for murder. *People v. Kuntu*, 196 Ill. 2d 105, 130, 752 N.E.2d 380, 395 (2001). The State concedes that the defendant can only be convicted of one count of murder. The State then suggests that this case be remanded to the trial court to determine whether it intended to impose a 50-year imprisonment sentence for murder, plus an enhancement of 30 years of imprisonment because the defendant used a firearm.

Although the defendant urges this court to merge the two counts in order to clarify the defendant's sentence, we decline to do so. The sentence imposed by the trial court in this case is

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[2]A first-degree murder conviction carries a sentence of not less than 20 years and not more than 60 years of imprisonment. 730 ILCS 5/5-8-1(a)(1)(a) (West 2008). The firearm enhancement adds 25 years, or up to a term of natural life, to the sentence. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008).

unclear at best, and likely improper. The uncertainty of the defendant's sentences breaches the rule that "'a defendant is entitled to know precisely what his sentence is [citation], and those charged with execution of the sentence must be able to ascertain its meaning.'" *People v. Wilson*, 293 Ill. App. 3d 339, 343-44, 687 N.E.2d 1182, 1185 (1997) (quoting *People v. Brown*, 142 Ill. App. 3d 712, 714, 492 N.E.2d 238, 240 (1986) (Harrison, J., dissenting)). Since it is not possible to determine from the record what the trial court intended when it sentenced the defendant, we vacate the defendant's sentences and remand the case to the trial court to allow the court to impose a proper, clear sentence that complies with statutory guidelines and established case law. See *People v. Artis*, 232 Ill. 2d 156, 179, 902 N.E.2d 677, 691 (2009).

We therefore affirm the defendant's convictions but vacate the defendant's sentences and remand the case to the trial court for resentencing.

Affirmed in part and vacated in part; cause remanded.