2011 IL App (1st) 101488-U

SECOND DIVISION
November 8, 2011

No. 1-10-1488

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from
	)	the Circuit Court
Plaintiff-Appellee,	)	of Cook County.
	)	
v.	)	No. 07 CR 8616 (01)
	)	
EDWON CARTER,	)	Honorable
	)	Steven J. Goebel,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn and Justice Cunningham concur in the judgment.

O R D E R

¶ 1 *Held*: Defendant was not denied a fair trial because of the introduction of excessive gang testimony or improper remarks in the prosecutor's closing statement. Evidence of witnesses' prior inconsistent statements was properly admitted. Defendant's sentence was appropriate where it was within the range permitted by statute and included mandatory additional time pursuant to the jury's findings.

¶ 2 Following a jury trial, defendant was convicted of first-degree murder and sentenced to 35 years' imprisonment and received an additional 25-year sentence for personally discharging a firearm. He now appeals his conviction and sentence, contending: (1) he was denied a fair trial

because the State elicited irrelevant gang testimony and made inflammatory remarks in its closing statement; (2) the court erred in admitting the prior inconsistent statements of two recanting witnesses as substantive evidence; and (3) his sentence was excessive. For the following reasons, we affirm defendant's conviction and sentence.

¶ 3 BACKGROUND

¶ 4 Defendant was charged with the murder of Jesse Franklin. The State's theory of the case was that defendant was a member of the Vice Lords gang and he shot Franklin, believing him to be a member of the rival Black P Stones gang. According to the State, on the night of Franklin's murder, defendant and Alton Spann, his co-defendant, were driving around in Black P Stone gang territory. Defendant and Spann saw some people on the porch at a house on South Winchester Street and believed that the people were Black P Stones. Defendant and Spann then drove to their gang's "stash spot," retrieved a gun, and returned to South Winchester. Defendant walked toward the porch and began shooting. Franklin was shot in the face and head and subsequently died from his injuries.

¶ 5 Before trial, the State made a motion *in limine* to introduce testimony about defendant's gang affiliation for the purpose of showing a motive for the shooting. The State asserted that Spann would be testifying against defendant and he would be the only witness testifying about gang affiliation. Spann would confirm that he and defendant were members of the Vice Lords gang. Spann would also testify that at the time of the shooting, the Vice Lords and Black P Stones were "at war," that he and defendant were driving around in Black P Stone territory, and that they believed the people they were shooting at were Black P Stones. Defense counsel

objected, arguing that the use of Spann's testimony at trial violated the discovery rules. Additionally, he argued that there was other evidence placing defendant at the scene, which made the gang testimony more prejudicial than probative. The court allowed the testimony, but admonished the State not to "make this trial completely all about gangs."

¶ 6 The following relevant testimony was adduced at trial. Farnika Marshall testified that at about 2:00 a.m. on June 17, 2006, she and her friend went to a birthday party in the 5600 block of South Winchester that was being held for Franklin, who was also known as "Squirt." Marshall stated that she, her friend, and Franklin were standing on the porch. While Marshall's back was to the street, she heard about nine gunshots fired from behind her. She ducked and ran inside the house with her friend and told the other partygoers what happened. Marshall did not see Franklin get shot, but she was aware that he did not follow her into the house. She then heard screaming after some other friends went to the front porch to check on Franklin.

¶ 7 Timothy Wright then testified under subpoena. He testified that on the night of the shooting, he was at his grandparents' house about a block away. He testified that he did not remember whether he saw a "brownish" car that morning, or whether he saw specific individuals in that car. He denied seeing that car drive the wrong way on a one-way street. He failed to make an in-court identification of anyone known as "Man-Man" or "Pee-Wee." He testified that he heard several gunshots that night, but does not recall what else happened. He did not recall being arrested on a drug charge several months later or telling the police that he had information about a murder. He did not remember identifying defendant in a photo array several months after that or signing a handwritten statement prepared by the State's Attorney. He also did not

remember testifying before a grand jury a month later.

¶ 8 Wright was then impeached with the signed, handwritten statement he gave to the State's Attorney. In it, he stated that he had known Franklin for many years and played basketball with him. He also stated that he knew defendant from the neighborhood and that his nickname was "Man-Man." He also stated that he has seen other people refer to a different person as "Pee-Wee," but that he had never talked to Pee-Wee.

¶ 9 Wright's statement explained that on the night of the shooting, he was outside of a house at 56th and Winchester. He saw a "brownish" sedan going east on 56th Street, which was a westbound one-way street. He saw that Man-Man was driving and Pee-Wee was in the passenger's seat. Wright stated that he saw them and they saw him. Wright saw Man-Man drive past again about 10 or 20 minutes later and thought he also saw Pee-Wee in the passenger seat. He saw the car stop on 56th Street, just past Winchester. Man-Man got out of the car and walked through some bushes, but he could not see if Pee-Wee also got out. Several minutes later, he heard as many as five or six gunshots fired. He ran into the house, told his grandmother to get down, and looked out the window. He then heard tires squeal and saw the car speed away down 56th Street.

¶ 10 Wright was also impeached with his grand jury testimony. In his testimony, he confirmed that he gave the above statement to the State's Attorney. The substance of his testimony was nearly identical to the content of his statement.

¶ 11 The State then called Darian Parker to testify. At trial, Parker testified that on the night of the shooting, he was at his house, about a block away from the house where Franklin's party

was being held. However, he admitted that several months later, while he was in custody on a drug charge, he told police that he saw defendant, whom he knew as Man-Man, shoot Franklin. He admitted that he identified defendant as the shooter in a photo array. Parker stated that the police told him they would drop his drug charge if he implicated someone in Franklin's murder. Parker also admitted that he gave a statement to the State's Attorney. He admitted to making some of the statements contained therein, but denied making others.

¶ 12 Parker was then impeached with the contents of his handwritten statement. In his statement, he said that he and Franklin were very good friends. Parker was walking to Franklin's party on the night of the shooting. When Parker turned on to Winchester Street, he saw Franklin on the porch with two other people. Parker then saw two men, known to him as Man-Man and Alton, appear from a gangway across the street. Parker identified them in photographs and by name. He knew Man-Man from the neighborhood and knew Alton from school.

¶ 13 According to Parker, when Man-Man and Alton reached the curb on the other side of the street, Man-Man pulled out a handgun, pointed it toward the porch where Franklin was, and fired at least four shots. Alton was standing next to Man-Man at the time. Parker then turned around and ran home. Several days later, Parker learned that Franklin died from his gunshot wounds.

¶ 14 Parker was also impeached with his grand jury testimony. He acknowledged before the grand jury that he gave the above sworn statement to the State's Attorney. His grand jury testimony was substantially the same as his handwritten statement. Additionally, on questioning from a juror, Parker testified that he was standing a couple of houses away from Franklin when the shooting occurred. Parker also stated that Man-Man did not say anything before he began

shooting.

¶ 15 Alton Spann also testified. He admitted that he was testifying pursuant to a plea agreement and that he was convicted of a lesser charge in exchange for his testimony. He stated that he and defendant had both been members of the Vice Lords for about 15 years. He stated that the Vice Lords and Black P Stones were "at war," meaning that they would shoot at and fight with each other. Spann stated that Vice Lord gang territory was adjacent to Black P Stone gang territory. Specifically, the block of South Winchester between 56th and 57th Streets was Black P Stone gang territory. When asked by the State, Spann demonstrated the Vice Lords' gang sign and the Black P Stones' gang sign with his hand. He also described the Vice Lords' gang colors as black and gold and the Black P Stones' gang colors as black and red.

¶ 16 On the night of Franklin's murder, Spann stated that he and defendant had been driving around smoking marijuana in Spann's car, a tan sedan, for several hours. They drove around within a few blocks of 56th Street and Winchester. In the early part of that evening, they saw a shooting in the area involving a fellow gang member and they decided to go get a gun. They drove to a Vice Lord "stash spot" a few blocks away where defendant retrieved a .38 caliber revolver owned by the gang.

¶ 17 Spann and defendant continued driving in the area and saw some people on a porch in the middle of the 5600 block of Winchester, which is a street controlled by the Black P Stones. Spann testified that he did not think the people were Black P Stones, but defendant thought they were. He stated that they drove around the corner again and parked the car on 56th Street and Winchester. They got out of the car, walked down the alley, and emerged from a gangway in the

middle of the block, across the street from the porch where Franklin, Marshall, and their friend were. Defendant was holding the gun and Spann was behind him. Spann testified that when he and defendant saw Franklin and the others on the porch, he knew that defendant was about to start shooting.

¶ 18 Spann testified that defendant was crouched down in the gangway and when he emerged, he stood up, raised the gun in front of him, pointed it at the porch, and fired about five shots. Spann said they both ran back to the car, drove back to the stash spot to return the gun, and then drove to a friend's house a few blocks away. Defendant and Spann told their friend about the shooting that just occurred. Spann said defendant told their friend, "I think I got one." Spann learned the next day that Franklin was the person who was killed.

¶ 19 After the close of all evidence, the parties gave closing arguments. In its argument, the State remarked that the Vice Lords and the Black P Stones gangs were,

> "as they use the term, at war, which means they shoot at each other, which means they fight each other, which means they do whatever crazy ridiculous stuff that these gangbangers do to each other while they terrorize the people who have to live on the streets of these communities."

¶ 20 Additionally, the following comments and responses were made in the State's rebuttal closing:

> "MR. DARMAN [Assistant State's Attorney]: In 2006, ladies and gentlemen, war raged in Englewood, the very soul of our society. Gangs and guns were then and still are tearing apart the fabric of our civilization.

In June of 2006, [defendant] and Alton Spann were active participants in that war. They engaged in gorilla [*sic*] tactics. They hid. They shot. They ran away. On June 17th of 2006, ladies and gentlemen, civilized society lost a battle.

MR. DECKER [Defense counsel]: Objection, your Honor.

THE COURT: Sustained.

MR. DARMAN: And Jesse Franklin lost his life. For no other reason than [defendant] and the Vice Lords wanted to continue their war against the Black [P] Stones. [Defendant] and the Vice Lords didn't care about Jesse Franklin. Because of [defendant] and the Vice Lords, another young man lost his life, and another family lost a son, a brother, and a husband.

MR. DECKER: Objection, your Honor.

THE COURT: Overruled.

MR. DARMAN: Who speaks for the slain in this war? Who speaks for them? The clergy? Parents? Loved ones? They can grieve, ladies and gentlemen, and they can hurt. But who fights back?

MR. DECKER: Objection, your Honor.

MR. DARMAN: Who assists you in the direction –

THE COURT: Mr. Darman, sustained as to war. Move on.

MR. DARMAN: Who assists you, ladies and gentlemen, in the direction of justice? In this particular case, it's the bystanders and sometimes combatants in this war.

***

MR. DECKER: Objection, your Honor, continuing objection.

THE COURT: Sustained.

***

MR. DARMAN: Jesse Franklin was a casualty of [defendant] and the Vice Lords. Though we can no longer hear Jesse's voice, soon you will have a voice. Because of what you saw and heard in this courtroom, you can speak for Jesse."

¶ 21 The court instructed the jury and sent it to deliberate. The jury ultimately convicted defendant of first-degree murder and specifically found that he personally discharged a firearm in the course of the murder.

¶ 22 The pre-sentence investigation report (PSI) disclosed the following relevant information. Defendant was 24 years old at the time of his arrest. He had two prior felony drug possession convictions. He was sentenced to two years' probation in one case, but he violated the terms of his probation and it was later revoked. He served one year in prison for the second drug offense. Defendant also was convicted of possession of a stolen motor vehicle and was sentenced to two years' probation and 30 days in jail. He was then convicted of driving under the influence while he was on probation for car theft, and a 12-month conditional discharge was imposed. It appears he was on probation and in the midst of his conditional discharge sentence when he committed the murder at issue in this case.

¶ 23 Defendant lived with both of his parents and three sisters, but his father died of illness in

2009. He came from a "good" home, did not suffer any abuse, and did not have contact with any family service agencies. He was expelled from high school and only completed tenth grade. He then worked in maintenance with his father for several years. Defendant was not married, but had a five-year-old son who lived with defendant's mother. He smoked marijuana and drank alcohol but denied having a substance abuse problem. He also denied being involved with gangs.

¶ 24 At the sentencing hearing, the State highlighted the fact that defendant had a "good" upbringing and argued that defendant "chose" to get involved with gangs. The State also noted that defendant was on probation at the time of his arrest. It then published the victim impact statement prepared by Franklin's wife.

¶ 25 In response, defense counsel argued that defendant should receive the minimum 20-year sentence because he did not have a lengthy or violent criminal history. He also argued that defendant had a job, a young son, and a close relationship with his family, which should mitigate the severity of his sentence. He argued that defendant was amenable to rehabilitation and sought the minimum sentence.

¶ 26 Upon consideration of the information contained in the PSI and the aggravating and mitigating factors presented, the court sentenced defendant to 35 years' imprisonment. The court remarked that the murder was violent, "senseless," and gang oriented, but also recognized that defendant's job, his attempt to complete his high school equivalency degree, and his rehabilitative potential were mitigating factors. The court also sentenced defendant to an additional 25 years' imprisonment based on the jury's finding that he personally discharged the

firearm that killed Franklin. Defendant's subsequent motion to reconsider the sentence was denied. This timely appeal followed.

¶ 27 ANALYSIS

¶ 28 Defendant first argues that the trial court erred in admitting certain gang-related testimony by Spann. He does not take issue with Spann's testimony that defendant was a member of the Vice Lords, that he and Spann drove around in rival gang territory, that he allegedly believed Franklin and the others on the porch to be members of a rival gang, or that he and Spann retrieved a gun from a Vice Lord stash spot after seeing those apparent gang members. In fact, he acknowledges that that testimony was relevant to the issue of motive. Rather, defendant attacks Spann's testimony that the Vice Lords' gang colors are black and gold, that the Black P Stones' gang colors are black and red, and Spann's demonstration of both groups' gang signs as "inflammatory" and "prosecutorial overkill."

¶ 29 The State claims that defendant forfeited this argument because he never objected at trial when the allegedly prejudicial comments were made. Defendant responds that he objected during the hearing on the motion *in limine,* which is sufficient to preserve his appeal under *People v. Boclair*, 129 Ill. 2d 458 (1989) and its progeny. We note that defense counsel's objection at the *in limine* hearing was confined to a discovery violation and a generic objection to gang testimony as being more prejudicial than probative in general. Notably, defense counsel did not object at trial when Spann testified about gang colors and signs, which would have alerted the court that the State may have exceeded the scope of the *in limine* order and provided the court with an opportunity to correct the error at the time it occurred. See *People v.*

Piatkowski, 225 Ill. 2d 551, 564 (2007). Nevertheless, with a generous reading of the scope of defendant's objection at the hearing, we follow the supreme court's holding that making an objection to a motion *in limine* is sufficient to preserve the issue for review where it is also included in a posttrial motion. However, as we have previously stated, attorneys must still be vigilant in objecting during trial. *People v. Maldonado*, 398 Ill. App. 3d 401, 416 (2010).

¶ 30 In any event, defendant's argument is without merit. Despite its potential for prejudice, evidence of gang-related activity is admissible at trial where there is sufficient proof that such activity is relevant in proving the crime charged. *Maldonado*, 398 Ill. App. 3d at 420. It is well-established that gang membership and participation in gang activities is admissible to provide evidence of motive for an otherwise inexplicable act. *People v. Suastegi*, 374 Ill. App. 3d 635, 645 (2007). However, the probative value of the evidence must outweigh its prejudicial effect. *Suastegi*, 374 Ill. App. 3d at 645. Thus, in the exercise of its discretion, the trial court must weigh the probative value of the gang evidence against its prejudicial effect to determine whether it should be admitted, and the court's decision will not be reversed absent an abuse of discretion. *Suastegi*, 374 Ill. App. 3d at 645.

¶ 31 Defendant relies on *People v. Nunley*, 271 Ill. App. 3d 427, 431-32 (1995), for the proposition that the court "should carefully limit the details [of gang evidence] to what is necessary to illuminate the issue for which the [evidence] was introduced." Accordingly, he argues, testimony about gang colors and signs goes beyond what is necessary to establish his motive for murder. While we do not disagree that "prosecutorial overkill" may occur in the introduction of gang evidence or other crimes evidence, this is not such a case and defendant's

comparison to *Nunley* is unpersuasive.

¶ 32 In *Nunley*, the defendant was on trial for shooting a victim to death during a robbery. He admitted to committing the robbery and shooting while he was in custody following his arrest for stabbing his mother and her dog. The State then elicited testimony from four witnesses that the defendant tried to " 'cut [his mother's] head off' " because he thought that she was possessed by Satan. *Nunley*, 271 Ill. App. 3d at 429-31. The defendant also stabbed the family dog when it tried to intervene "because it was also possessed by Satan." The witnesses also described that the defendant was found in the gangway "with large amounts of blood on his legs, hands and torso." *Nunley*, 271 Ill. App. 3d at 429. The State argued that the stabbing testimony was necessary to explain why the defendant spontaneously confessed to a robbery and murder committed 16 months earlier. *Nunley*, 271 Ill. App. 3d at 432.

¶ 33 The court allowed that some evidence of the stabbing was necessary to establish the voluntariness of the confession. However, the court ultimately held that the "extremely inflammatory nature" of the stabbing and the amount of evidence solicited was overly prejudicial to the defendant. *Nunley*, 271 Ill. App. 3d at 432. It concluded that the "detaile[d] and repetitive manner in which the evidence was presented greatly exceeded what was required to accomplish this purpose and subjected defendant to a mini-trial over conduct far more grotesque than that for which he was on trial." *Nunley*, 271 Ill. App. 3d at 432. It noted that the testimony of one witness to establish how defendant came into custody would have been sufficient, but that the "continuing narrative" of the defendant's arrest was irrelevant to whether he robbed and murdered the victim in the case being prosecuted. *Nunley*, 271 Ill. App. 3d at 432.

¶ 34 This case is not remotely similar to *Nunley*. The State represented during the hearing on its motion *in limine* that Spann would be testifying about his and defendant's gang involvement, and that he would be the only witness to do so, for the purpose of establishing motive. Spann did just that, providing information about the duration of his and defendant's membership in the Vice Lords, explaining the nature of the "war" between the Vice Lords and the Black P Stones, and explaining that the "war" was the reason that defendant shot Franklin, believing him to be a rival gang member. Spann's testimony about the gangs' colors and signs was background information establishing that he had personal knowledge of each gang and their on-going feud. See *People v. Davis*, 335 Ill. App. 3d 1, 15-16 (2002). Spann's brief mention of those details was not referenced again throughout the trial. The testimony was not repetitive or excessive and was properly admitted as being more probative than prejudicial. Thus, we reject defendant's contention that he was prejudiced by that testimony as the defendant was in *Nunley*.

¶ 35 Similarly, we reject defendant's comparisons to *People v. Cardamone*, 381 Ill. App. 3d 462, 495-97 (2008), where the defendant was charged with 26 acts of sexual assault and the State introduced evidence of hundreds of alleged acts of assault that were not being prosecuted; *People v. Funches*, 59 Ill. App. 3d 71, 73-74 (1978), where the State's witnesses testified about seven other car thefts allegedly perpetrated by defendant in his prosecution for theft; and *Maldonado*, 398 Ill. App. 3d at 420-21, where the State violated the order on the motion *in limine* by eliciting gang testimony from several additional witnesses and attempting to use the testimony to establish motive, rather than using it for impeachment purposes only, as the court permitted.

¶ 36 Defendant also claims that he was prejudiced by comments made by the State during opening and closing arguments. Here, some of defendant's arguments are forfeited on appeal. It is well-established that to preserve an issue for appeal, a defendant must object at trial or in a motion *in limine* and include the issue in a posttrial motion. *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007); *Maldonado*, 398 Ill. App. 3d at 415 (citing *Boclair*, 129 Ill. 2d at 476). Defendant's posttrial motion attacked the State's "impassioned plea in [its] rebuttal [closing] argument" as being "highly prejudicial wherein [the Assistant State's Attorney] argued, 'who fights for the innocent victims in this war,' 'who speaks for the victims of this war,' and 'civilized society lost' all as a result of the defendant's actions." Accordingly, we confine our review to those comments, which were objected to at trial and included in defendant's posttrial motion. All other comments complained of on appeal are forfeited. *Wheeler*, 226 Ill. 2d at 122.

¶ 37 Prosecutors are generally given wide latitude with comments made in closing arguments. *People v. Evans*, 209 Ill. 2d 194, 225 (2004). When evaluating a claim of prejudice, we consider the complained-of comments in the context of the closing argument as a whole. *Evans*, 209 Ill. 2d at 225. We will only find reversible error based on improper closing arguments where a defendant can "identify remarks of the prosecutor that were both improper and so prejudicial that real justice [was] denied or that the verdict of the jury may have resulted from the error." *Evans*, 209 Ill. 2d at 225 (additional citations omitted).

¶ 38 Here, the complained-of comments were not so prejudicial as to warrant reversal. In the context of the entire argument, the prosecutor was commenting on evidence presented at trial. Spann testified that the Vice Lords and Black P Stones were "at war," meaning that they would

shoot at and fight with each other. The prosecutor referenced that testimony right before he made the complained-of remarks about the "victims of this war." Additionally, Spann testified that Franklin was shot because defendant thought he was a Black P Stone and thought he was furthering the ongoing "war," which made Franklin an innocent victim of the gang "war." This is not a case where the prosecutor improperly forged an "us-versus-them" mentality and incited the jury to send a message to all gangbangers everywhere. *Cf. Wheeler*, 226 Ill. 2d at 129. Moreover, the remarks complained of by defendant were merely passing comments in a rebuttal argument that otherwise responded to the arguments made by defense counsel in his closing.

¶ 39 Nevertheless, any improper inferences drawn from those comments were cured where the court sustained defense counsel's objections to each of the complained-of comments and instructed the jury that closing arguments were not to be considered as evidence. *People v. Bannister*, 232 Ill. 2d 52, 91 (2008); *Wheeler*, 226 Ill. 2d at 128. Defendant correctly notes that our courts have, on occasion, held that simply sustaining an objection and instructing the jury will not cure the defects caused by grossly improper arguments. *Wheeler*, 226 Ill. 2d at 130. However, those cases involved extreme circumstances or such persistence by the prosecutor in making improper remarks that it "eliminated the salutary effect of the trial judge's sustaining of the defense objections." *People v. Weinstein*, 35 Ill. 2d 467, 471 (1966).

¶ 40 For example, in *People v. Fletcher*, 156 Ill. App. 3d 405, 411-12 (1987), the prosecutor argued that failing to convict the defendant in a sexual abuse case would "encourage potential sex offenders to abuse families." Moreover, the prosecutor recounted the seven-year-old victim's testimony while sitting in the witness chair and using the anatomical dolls that the

victim used while she testified. That behavior was held to be so egregious that it could not be cured by sustaining an objection. *Fletcher*, 156 Ill. App. 3d at 411-12. Additionally, in *Weinstein*, the supreme court held that where a defense objection to a prosecutor's improper comment was sustained, and the prosecutor persisted in making the improper comment 16 more times, merely sustaining the objection could not cure the prejudice injected in that case. *Weinstein*, 35 Ill. 2d at 469. The extraordinary circumstances of *Fletcher* and *Weinstein* are not present here. Furthermore, having found no individual instances of error, we conclude that there was no cumulative error to warrant reversal in this case. *People v. Foster*, 322 Ill. App. 3d 780, 791 (2000).

¶ 41 Defendant next argues that the trial court erred in admitting the prior inconsistent handwritten statements and grand jury testimony of Wright and Parker as substantive evidence under section 115-10.1 of the Code of Criminal Procedure (the Code) (725 ILCS 5/115-10.1 (West 2008)). He concedes that he did not preserve this argument for review, but argues that we should review it for plain error. We may review an unpreserved error under the plain error doctrine when either (1) the evidence is closely balanced and the error alone threatened to tip the scales of justice against him, or (2) the error is so serious that it affected the fairness of the trial and challenged the integrity of the judicial process. *Piatkowski*, 225 Ill. 2d at 564 (quoting *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005)). The first step in a plain error analysis is to determine whether error occurred at all. *Piatkowski*, 225 Ill. 2d at 564.

¶ 42 Defendant contends that while admission of either the handwritten statement or grand jury testimony that contradicts a witness's trial testimony is proper, the introduction of multiple

statements that are inconsistent with the trial testimony, but consistent with each other, is improper because it violates the rule against admitting prior consistent statements that bolster a witness's testimony. We have rejected this very argument on several occasions. See, *e.g.*, *Maldonado*, 398 Ill. App. 3d at 423; *People v. Johnson*, 385 Ill. App. 3d 585, 606-09 (2008). We have explained that whether a statement is inconsistent for purposes of impeachment or admissibility under section 115-10.1 is determined by comparing the out-of-court statement with the trial testimony. *Maldonado*, 398 Ill. App. 3d at 423. Where, as here, a witness testifies at trial that he does not remember what happened on the night of a shooting, but is impeached with his prior signed, handwritten statement attesting to the contrary, the statement is admissible as substantive evidence to be considered by the jury. Where the witness is also impeached with his grand jury testimony that contradicts his trial testimony, the grand jury testimony is admissible as substantive evidence, regardless of the fact that it is consistent with the earlier admitted handwritten statement. *Maldonado*, 398 Ill. App. 3d at 423.

¶ 43 Defendant acknowledges the holdings in *Johnson* and *Maldonado*, but argues that they were wrongly decided because they ignore the fact that once the handwritten statement is admitted as substantive evidence, the grand jury testimony should be considered consistent with that evidence and should be barred by the rule against admitting prior consistent statements. We disagree with that analysis. Considering, as we must, that the out-of-court statements are to be compared to the trial testimony for purposes of determining whether they are consistent or inconsistent, defendant's argument does nothing to change the analysis. Rather, his argument assumes that when a prior inconsistent statement is admitted as substantive evidence it becomes

the witness's trial testimony. However, that is not the effect of the substantive admission of a prior inconsistent statement and, consequently, his argument fails. *Cf.* Michael H. Graham, Cleary & Graham's Handbook of Illinois Evidence § 801.9 (9th ed. 2009) (a prior inconsistent statement becomes the witness's in-court testimony only where the witness acknowledges making the statement and the truth of its contents at trial). Accordingly, because there was no error in the admission of the evidence, there can be no plain error, and we must honor defendant's procedural default. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 44 Defendant's final argument on appeal is a challenge to his sentence. He contends that the trial court erred in not giving adequate consideration to his non-violent background, his youth, and his rehabilitative potential when delivering its sentence.

¶ 45 It is well established that the trial court has broad discretion in sentencing a defendant because it is in a superior position to assess the credibility of witnesses and to weigh the evidence presented at the sentencing hearing. *People v. Alexander*, 239 Ill. 2d 205, 212 (2010). Accordingly, we will not reverse a defendant's sentence absent an abuse of discretion. Where the defendant's sentence falls within the sentencing range, we will only find an abuse of discretion if the sentence is at variance with the spirit of the law or disproportionate to the offense. *Alexander*, 239 Ill. 2d at 212.

¶ 46 In determining an appropriate sentence, the trial court must consider all factors in aggravation and mitigation, including defendant's age, mental ability, credibility, demeanor, moral character, social environment, and habits. *Alexander*, 239 Ill. 2d at 212. However, the most important factor in sentencing is the seriousness of the crime. *People v. Flores*, 404 Ill.

App. 3d 155, 159 (2010). Where mitigating evidence is before the trial court, it must be presumed that the trial court considered the evidence absent some indication otherwise. *Alexander*, 239 Ill. 2d at 212. Nevertheless, a defendant's rehabilitative potential cannot outweigh the seriousness of the crime committed. *Alexander*, 239 Ill. 2d at 214. Even if we may have balanced the sentencing factors differently, we may not substitute our judgment for that of the trial court. *Alexander*, 239 Ill. 2d at 212.

¶ 47 Here, defendant was convicted of first-degree murder, an offense is punishable by a sentence of 20 to 60 years' imprisonment (730 ILCS 5/5-8-1(a)(1)(a) (West 2008)). Defendant's 35-year sentence is in the middle of that range. Based on the information in the record, including the facts of the offense, the felony convictions contained in defendant's PSI, his then-pending terms of probation and conditional release, and the arguments and evidence in mitigation and aggravation, we cannot say that the trial court abused its discretion in sentencing defendant to 35 years' imprisonment.

¶ 48 Additionally, the court was required to impose an additional sentence of 25 years to life following the jury's determination that defendant personally discharged the firearm in the course of the murder. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008). Here, the court imposed the minimum additional sentence, which was within its discretion to do. Thus, the court did not abuse its discretion in sentencing defendant to a combined 60 years' imprisonment.

¶ 49 For the foregoing reasons, we affirm defendant's conviction and sentence.

¶ 50 Affirmed.