2012 IL App (1st) 102170-U

FIFTH DIVISION
March 16, 2012

No. 1-10-2170

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 CR 14511
	)	
ERIKA RAY,	)	Honorable
	)	Lawrence P. Fox,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE EPSTEIN delivered the judgment of the court.
Justices J. Gordon and McBride concurred in the judgment.

ORDER

¶ 1 *Held*: Assuming that trial court erred in admitting out-of-court statement of co-defendant Lorenzo Wilson, the error is harmless under the harmless error standards for evidentiary and constitutional errors. Trial court did not abuse its discretion in admitting certain portions of prior statements that described what Lorenzo did after the shooting or in admitting "cumulative" prior inconsistent statements. Trial court did not abuse its discretion in imposing sentence for first degree murder conviction.

¶ 2 Following a jury trial, defendant Erika Ray was convicted of first degree murder and armed robbery. On appeal, defendant first raises three arguments as to why the trial court erred in admitting an out-of-court statement from co-defendant Lorenzo Wilson. Defendant argues

that (1) the statement did not meet the requirements of the co-conspirator exception to the hearsay rule; (2) admitting the statement violated her sixth amendment right to confrontation and her right to due process; and (3) even if Lorenzo's statements were admissible under the co-conspirator exception, the trial court erred in admitting those statements through the audio-taped and handwritten statements of State witness Charles Wilson because Charles did not have personal knowledge of the events Lorenzo described. Defendant next argues that certain portions of Charles Wilson's prior statements describing what Lorenzo did after the shooting should not have been admitted because they were irrelevant and prejudicial and that Charles's prior inconsistent statements should not have been admitted because they were unnecessarily cumulative. Finally, defendant contends the trial court abused its discretion by imposing a 42-year sentence for the first degree murder conviction. For the reasons that follow, we affirm defendant's conviction and sentence.

¶ 3 BACKGROUND

¶ 4 In the early morning of June 15, 2006, Corey Ebenezer was shot and killed at Leona's Restaurant in Hyde Park. Erika Ray and Lorenzo Wilson were later charged with first degree murder and armed robbery and were tried in a single trial with separate juries.

¶ 5 *Testimony from Leona's Employees*

¶ 6 At trial, the jury heard testimony from Justin Twine, Lucio Mastache, and Jason Sline, who worked with Erika at Leona’s Restaurant. On the evening of June 14, 2006, a large group came into Leona’s and sat down to order food. Twine, who was working as a server that night,

testified that there were about 30 people in the party. Erika wanted to serve the entire group, but Corey Ebenezer, an assistant manager, told Erika that she could not handle the table alone. When Erika insisted that she serve the entire party, Ebenezer told her to go home. Erika refused and proceeded to serve the table.

¶ 7 Ebenezer called district manager Augustin Monnarez and informed him that he asked Erika to go home but she refused. Jason Sline, a manager, then received a call asking him to go to the restaurant. Around 9 or 9:30 p.m., Sline arrived at Leona's and discussed what happened with Ebenezer, Erika, and the servers. Sline then told Erika that she would have to work at a different location of Leona's Restaurant. When Erika declined the offer, Sline fired her. Erika told Sline that she understood and then said, "But f*** you Corey, Corey, f*** you" and left the restaurant.

¶ 8 Around midnight, Mastache and Twine were still at Leona's. The restaurant was closed. As Mastache was cleaning the kitchen, he saw three unknown men hit Ebenezer in a small kitchen hallway near the cash registers at the private back entrance of the restaurant. Mastache then heard three gunshots. Mastache went the front of the restaurant to find Twine, and when they returned to the kitchen, Ebenezer was lying next to a cash drawer on the floor. Ebenezer told Twine that he "just got ganked," which meant he had been robbed. Ebenezer later died from his injuries.

¶ 9 *Paris Gosha*

¶ 10 Paris Gosha is Erika's cousin and had been Lorenzo's friend since childhood. Gosha testified that he also was charged with the murder and armed robbery of Corey Ebenezer. In exchange for the State's agreement to drop the murder charges, Gosha agreed to testify against Erika and Lorenzo and plead guilty to the armed robbery charge. Gosha would receive a 30-year sentence (but understood that he would only serve half of it) and would be placed in a witness protection program. At the time of his testimony, Gosha was in the witness protection program in the Cook County jail, where he received various privileges, including a $35 weekly payment.

¶ 11 On the night of June 14, 2006, Gosha went to see friends at 54th and Peoria. Lorenzo came into the house and told him that Erika, who was in her car outside, wanted to speak with Gosha. Erika told Gosha that she had just been fired and wanted him "to beat her boss' ass." Gosha then gathered his younger brother, Demetrius (or "DJ"), and a friend named Anthony Macon to go with Erika and Lorenzo. Erika drove Lorenzo, Gosha, Macon, and DJ to Leona's and parked the car. As they waited, a man with a Jamaican accent approached the car three times and spoke with Erika about going into the restaurant. At one point, when the group was ready to enter the restaurant, the man told them to get back in the car. Gosha heard the man say that some people inside the restaurant with Ebenezer might help him fight.

¶ 12 After about two hours, Lorenzo, Gosha, Macon, and DJ entered the back entrance of Leona's. Lorenzo pointed a pistol at Ebenezer's face, and Gosha "grabbed some money" from the cash register. Lorenzo and Ebenezer began to struggle and a shot was fired. The men continued

to wrestle until Macon came through the door and tried to break up the fight. Ebenezer slipped on the floor. Lorenzo then stood over him and shot him. The four men fled to Erika's car.

¶ 13 The next day, Gosha met with Lorenzo, Macon, and DJ at Gosha's house, where they watched news coverage about the shooting. Gosha did not see Lorenzo after that day. Gosha first talked to police about the shooting in August 2006, but told them that he did not know anything. Gosha admitted his involvement in June 2007, after Macon had spoken to police about the incident.

¶ 14 *Anthony Macon*

¶ 15 Anthony Macon testified that he was at 54th and Halsted on June 14, 2006. Erika pulled up in her car, and Gosha and Lorenzo went to talk to her. Gosha and Lorenzo told Macon to "come on," and he got in the car with them. Lorenzo told Macon that they were going to Leona's because "some guy got her fired and they wanted to beat him up." Macon did not hear Erika say that they should rob the man. As Erika drove to the restaurant, Macon saw Lorenzo, who was seated next to him in the backseat, holding a small gun with a pearl handle.

¶ 16 After Erika parked her car, a man with an accent came and spoke to her. When he spoke with Erika a second time, she moved her car down the street and parked because it was time for the men to go inside. Erika told the group that the back door would be open. Macon headed to the front entrance while the others went to the back entrance. Macon then heard two gunshots coming from inside and headed to the back door. There, he saw Lorenzo, Gosha, DJ, and a man fighting. Macon tried to pull Gosha out of the struggle.

¶ 17 The group returned to Erika's car. Gosha got into the trunk while the others got in the

backseat. Macon then heard Wilson say that he thought he killed the man inside the restaurant. The group returned to Gosha's house and met again there the next day.

¶ 18 Macon told police in July 2006 that he did not know Gosha or Lorenzo and did not know anything about the shooting. Two weeks later, Macon told detectives about the incident. Macon testified that he could not remember if, during a January 2007 interview with police, he stated that he did not know if Lorenzo had a gun until he got back in the car after the shooting. Macon explained that after giving the statements, he was never charged with any crime. Macon testified that neither the police nor the State's Attorney promised that Macon would not be charged if he gave a specific statement or testified a certain way.

¶ 19 *Charles Wilson*

¶ 20 Charles Wilson, the great-uncle of Lorenzo Wilson, testified for the State. Charles had lived in Gulfport, Mississippi, but he was currently in federal prison for a gun possession conviction in an unrelated case. Charles initially testified that he did not see his great-nephew in the courtroom, but after Lorenzo stood up, Charles acknowledged that Lorenzo was his great-nephew. When asked if he was in Chicago in June 2006, Charles testified that he did not recall and then indicated that he would "plead the Fifth." The State asked for a sidebar and indicated that it would grant use immunity to Charles in exchange for his testimony. The court signed a form adjudging Charles a material witness and ordering him to testify.

¶ 21 Outside the presence of the jury, the court told Charles that he could not plead the fifth amendment and that he would face contempt charges if he did not testify. Charles responded that he would take the punishment. The State then informed the court that it wished to confront

Charles with three prior inconsistent statements. The State argued that all these prior statements were admissible under two statutes: the "regular prior inconsistent statement statute" (725 ILCS 5/115-10.1 (West 2008)) and the statute covering admissibility of prior statements when a witness refuses to testify despite a court order (725 ILCS 5/115-10.2 (West 2008)). Counsel for Lorenzo objected to the statements' admissibility under both statutes, but the court found them generally admissible as prior inconsistent statements under section 115-10.1. As to admissibility of the statements against defendant Erika Ray, the State argued, in a motion *in limine*, that any portions of Charles's statements that included Lorenzo's statements were admissible against Erika because Lorenzo's statements qualified as co-conspirator admissions. Erika's counsel objected, arguing that Lorenzo's statements to Charles were not made in furtherance of a conspiracy and were therefore inadmissible hearsay. The court agreed that some portions of Lorenzo's statements were not admissible as co-conspirator admissions, but allowed the State to present other portions of Lorenzo's statements to the jury. The State later redacted those portions of Charles's statements that the court found inadmissible.

¶ 22 After the jury returned, the State asked Charles about his prior statements: an audiotaped statement he gave to Sergeant Schlicht of the Gulfport police department in Mississippi on December 6, 2006; a signed handwritten statement Charles gave to Detective Lutzow of the Chicago police department and Assistant State's Attorney Martha Kross on December 19, 2006; and Charles's testimony before a grand jury on May 24, 2007. Charles stated either that he did not recall making the statements, he did not know if he made them, or he was "high on drugs" when he made the statements. At one point, Charles also testified that he did not make the

statements and he was the one who shot Ebenezer.

¶ 23 The State confronted Charles with his three prior statements, which all provided a similar account of his interactions with Lorenzo. On the evening of June 14, 2006, Charles was visiting Lorenzo's mother at her house in Chicago. Lorenzo returned home very late that night and was not acting like himself. Charles asked him what was wrong. Lorenzo responded, "I think I shot somebody." Charles asked if he had killed the person, but Lorenzo responded that he did not know. Charles told Lorenzo to tell his father. The next day, Charles learned that Lorenzo had not told his father what had happened, so Charles told him. Charles left the house, but returned later that day, after receiving a phone call from Lorenzo's mother. Lorenzo's parents asked Charles to take Lorenzo to Charles's home in Mississippi. As Charles and Lorenzo were preparing to leave, news came on television about the shooting at Leona's, including a picture of the man who was shot.

¶ 24 Lorenzo and Charles left later that night, when it was dark, so that the neighbors would not see them go. As they were driving to Mississippi, Charles asked Lorenzo where the gun was. Lorenzo pulled a rag out of his pocket and showed Charles the dismantled gun. Lorenzo said that the gun was the one he used to shoot the man in the restaurant. Charles told him to get rid of the gun, and Lorenzo started to throw parts of it out the window. Charles told him to stop, however, because he thought the handle, spring, and clip would fit one of his other guns. Lorenzo stayed with Charles in Mississippi for about four months and then went to stay with his "play niece" in Miami, Florida.

¶ 25 The State called three witnesses to prove up Charles's prior statements. Assistant State's Attorney Sanjay Patel testified regarding Charles's grand jury testimony. Next, Assistant State's Attorney Martha Kross testified as to Charles's handwritten statement, which contained similar information to the grand jury testimony. The State then called Sergeant Schlicht of the Gulfport, Mississippi police department. Schlicht explained that in November 2006, Charles Wilson was brought into the police department on weapons charges. Schlicht received information that Charles wanted to speak with him regarding a homicide in Chicago. On December 6, 2006, Schlicht took a 10-minute audio recording of Charles's statement. Portions of the recording were played for the jury.

¶ 26 The State also asked Charles about documents drafted by the Gulfport police in which Charles consented to a search of his truck and a search for gun parts in his home. Charles stated that he kept a plastic box of various gun parts in his home and that he vaguely remembered going with the Gulfport police to his home and showing them where the handle, spring, and clip were. When the State showed Charles a handle to the gun, he stated he did not know what it was and he did not recognize it.

¶ 27 The jury also heard testimony from Sergeant Schlicht and Detective Brian Lutzow of the Chicago police department regarding recovery of gun parts at Charles' residence and the arrest of Lorenzo Wilson. Charles consented to a search of his home, during which police recovered a gun handle, clip, and coil spring. Charles told police that the gun parts belonged to Lorenzo and were part of the gun Lorenzo had in the car on the trip from Chicago to Mississippi. Detective

Lutzlow testified that he received the inventoried gun parts. Later, based on information received from Charles, Lorenzo was arrested and transported back to Chicago.

¶ 28 *Erika Ray*

¶ 29 After the State rested, the jury heard testimony from Erika Ray. Erika testified that in June 2006, while she was a student Roosevelt College in Chicago, she worked part-time at Leona's Restaurant. On June 14, 2006, at around 9:30 pm, a party of 16 people entered the restaurant, and Erika began to set up tables. Ebenezer asked why Erika had not told him there was a party in the dining room. Erika responded that she was going to let the kitchen staff know after she was finished setting up the tables. Ebenezer told Erika to clock out and go home. She responded, "No," because she did not know Ebenezer was a manager.

¶ 30 When general manager Jason Sline arrived, Erika told him what had happened. Sline told Erika that he could transfer her to another location, and Erika responded, "No, thank you." Sline then fired Erika. Erika admitted that she was upset, but denied saying anything else as she left Leona's.

¶ 31 After leaving the restaurant, Erika drove to pick up her daughter at her grandmother's house. She saw Paris Gosha on the way, who got in the car. Erika told him what had happened and said she "should have checked Corey" and "cursed him out." Gosha asked if Erika wanted him to beat up Ebenezer, and Erika answered yes. Gosha then got out the car. Erika did not know where he was going, but Gosha soon returned with Lorenzo, Macon, and DJ. Erika drove them to Leona's.

¶ 32 Erika parked in a cul-de-sac near the back entrance to Leona's, and everyone got out of the car to go toward the side of the restaurant. An African man named Mamadou Bah, who worked as a Leona's delivery man, was standing outside the restaurant. Erika explained to him that she had been fired, and Mamadou told Erika and the men to "hold on." They returned to the car, and Erika moved the car halfway down the block. As she was waiting, Erika thought to herself, "I don't have time for this," and started to drive off. When she got to the stop sign at the end of the block, Mamadou whistled. The men in the car got out and went into the back of the restaurant.

¶ 33 About a minute later, Erika heard gunshots. The four men then returned to her car, and Gosha asked Erika to pop the trunk. She left the men at 53rd and Morgan, but did not say anything to them. The next day, Erika saw Gosha and told him that Ebenezer was dead. Erika denied receiving money from Gosha or telling any of the men to rob or shoot Ebenezer. Erika testified that she did not know that Lorenzo had a gun.

¶ 34 On cross-examination, Erika acknowledged that she lied to the police during interviews on June 15 and June 16, 2006. Erika first told police that she was at her daughter's grandmother's house at the time of the shooting, and she later told police that she was with a friend at the time.

¶ 35 *Verdict and Sentencing*

¶ 36 The jury found defendant guilty of first degree murder and armed robbery, and the court sentenced defendant to 42 years for first degree murder and 20 years for armed robbery, with the sentences to be served concurrently. This appeal followed.

¶ 37 ANALYSIS

¶ 38 *Lorenzo Wilson's Out-of-Court Statement to Charles Wilson*

¶ 39 Defendant first argues that Lorenzo's statement to Charles Wilson, which was admitted through Charles's testimony, was inadmissible hearsay. After returning home from Leona's just after the shooting, Lorenzo told Charles that he though he shot someone. Defendant contends Lorenzo's statement was inadmissible under the co-conspirator exception to the hearsay rule and argues that admission of the statement violated her sixth amendment right to confrontation and her due process right to a fair trial. We must consider the claim of evidentiary error first and determine whether any error warrants reversal before addressing the constitutional claims. See *In re E.H.*, 224 Ill. 2d 172, 180 (2006) (directing appellate court to only consider constitutional challenge to evidence where evidentiary ruling is not error or is harmless error).

¶ 40 The parties initially disagree about whether the error was properly preserved for review. To preserve an issue for review, a defendant must object both at trial and in a written posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). The State concedes that defendant objected to the admission of Lorenzo's out-of-court statements at trial, but argues that the issue was not raised again in a posttrial motion. In her motion for new trial, defendant argued that "allowing hearsay statements of Lorenzo Wilson, through Charles Wilson, violated defendant's right to confront and cross-examine witnesses." At the hearing on the motion, the court asked if "[t]his deals with statements that you're claiming were not pursuant to the co-conspirator exception to the hearsay rule," to which defense counsel responded, "[t]hat's correct." The judge

then found that the statements were properly admitted under the co-conspirator exception because they were made "[d]uring the time that the conspiracy existed." We conclude that the issue was properly raised in the trial court and preserved for our review. Thus, if we find error, we will consider whether the error is harmless. An evidentiary error is harmless "where there is no reasonable probability that the jury would have acquitted the defendant absent the error." See *In re E.H.*, 224 Ill. 2d at 180 (quoting *People v. Nevitt*, 135 Ill. 2d 423, 447 (1990)).

¶ 41 Defendant argues that Lorenzo's statement does not fall under the co-conspirator exception to the hearsay rule because it was not made in furtherance of any objective of the conspiracy. The State counters that Lorenzo's statement was a request for help in concealing the crime and is thus admissible because statements relating to attempts at concealment further the objective of the conspiracy. We need not resolve this issue, however, because even assuming that the trial court erred in admitting Lorenzo's statement, the error is harmless.[1]

¶ 42 Defendant argues that the error is not harmless because "Lorenzo's statements that he shot and killed someone could have affected the jury's assessment of Ray's credibility in testifying that she was unaware that the boys were going to commit robbery and murder." Defendant offers no coherent explanation, however, as to how Lorenzo's statement had an impact on her claim that

[1] In light of this conclusion, we need not address defendant's additional claim that those parts of Charles Wilson's prior audiotaped and handwritten statements that contained Lorenzo's statements were inadmissible because Charles Wilson did not have personal knowledge of the events Lorenzo described. See 725 ILCS 5/115-10.1(c) (West 2008); *People v. McCarter*, 385 Ill. App. 3d 919, 929 (2008). We have found that any error in admitting Lorenzo's statement as a co-conspirator admission is harmless, and thus any error in admitting those portions of Charles Wilson's statements that repeat Lorenzo's statement would also be harmless.

the only plan was to "beat up" Ebenezer. Lorenzo's statement did not describe the group's plans to rob Ebenezer or indicate that defendant knew Lorenzo had a gun. Lorenzo's acknowledgment that he thought he shot someone does not mean that defendant planned for it to happen. Defendant's counsel plainly acknowledged as much during opening statements by conceding that "Corey Ebenezer was shot and killed by Lorenzo Wilson" while also arguing that defendant had no plan to murder or rob Ebenezer.

¶ 43 Even if Lorenzo's confession somehow impacted Ray's defense, there was substantial evidence at trial, apart from the confession, that Lorenzo shot Ebenezer. Anthony Macon testified that while the group was traveling away from Leona's after the shooting, defendant said that he thought he killed the man inside the restaurant. Paris Gosha watched as defendant stood over Ebenezer and shot him. We acknowledge that it is possible that the jury viewed this testimony with some skepticism because Gosha took a plea deal and Macon was not charged for his involvement, but there was also circumstantial evidence that Lorenzo shot Ebenezer. For example, the jury heard testimony that Lorenzo left for Mississippi the night after the shooting, and on the way, he threw parts of a pearl-handled gun out of the car window.

¶ 44 While the jury apparently discredited defendant's testimony that she did not know Lorenzo had a gun or that the group planned to rob Ebenezer—or that she changed her mind about going to "beat up" Ebenezer—we do not see how the jury would have viewed her testimony differently absent the statement from Lorenzo. It was Paris Gosha's and Anthony Macon's testimony, not Lorenzo's statement, that directly challenged defendant's claim that she

drove away from Leona's because she decided to abandon the plan to beat up Ebenezer. Lorenzo's confession to Charles Wilson did nothing to corroborate Gosha's and Macon's detailed accounts about defendant's actions before and after the shooting. We conclude that there is not a reasonable probability that the jury would have acquitted defendant without the statement from Lorenzo.

¶ 45 Having found that any error in admitting Lorenzo's statement under the co-conspirator exception is harmless, we turn to defendant's constitutional claims. Defendant argues that the trial court violated her rights under the Due Process Clause and Confrontation Clause of the United States and Illinois constitutions when it "admitted statements of a non-testifying co-defendant that implicated defendant in the crime." See *Bruton v. United States*, 391 U.S. 123, 136 (1968); *People v. Duncan*, 124 Ill. 2d 400, 412-13 (1988). In this particular case, however, we need not determine whether defendant's constitutional rights were violated. Like the evidentiary error, the potential constitutional violations arising from the admission of Lorenzo's statement are subject to harmless error review. *Lee v. Illinois*, 476 U.S. 530, 547 (1986) (remanding for determination whether *Bruton* violation was harmless error); *People v. Williams*, 196 Ill. App. 3d 851, 862 (1990); *People v. Patterson*, 217 Ill. 2d 407, 425 (2005) (United States Supreme Court "expressly rejected the claim that the admission into evidence of a statement made by a nontestifying codefendant *** can never be harmless" and concluded that "the denial of the opportunity to cross-examine an adverse witness does not fit within the limited category of

constitutional errors that are deemed prejudicial in every case." (quoting *Delaware v. Van Arsdall*, 475 U.S. 673, 682 (1986)).

¶ 46 We acknowledge that in *People v. Fillyaw*, the Illinois Appellate Court, Second District stated that a *Bruton* violation "necessarily affects substantial rights and satisfies the second prong of the plain-error analysis." *Fillyaw*, 409 Ill. App. 3d 302, 319 (2011). However, we find no support for the conclusion that a *Bruton* violation is a structural error that requires automatic reversal regardless of its effect on the outcome of the trial. Most importantly, the court's statement in *Fillyaw* is contrary to the conclusion of the United States Supreme Court that a *Bruton* violation resulting from "the admission into evidence of a statement made by a nontestifying codefendant" is not a structural error requiring automatic reversal, but is subject to harmless error review. *Patterson*, 217 Ill. 2d at 425 (quoting *Van Arsdall*, 475 U.S. at 682); see also *Harrington v. California*, 395 U.S. 250, 254 (1969); *Arizona v. Fulminante*, 499 U.S. 279, 306-08 (1991). The appellate court cases cited in *Fillyaw* also do not support its holding. See *People v. Reeves*, 271 Ill. App. 3d 213, 220 (1995) (finding a *Bruton* violation and concluding that "the plain error rule is applicable *** *as the evidence is closely balanced*, and the error affected defendant's substantial rights") (Emphasis added.); *People v. Campbell*, 115 Ill. App. 3d 631, 636-38 (1983) (finding a *Bruton* violation and reversing where that the error was not "harmless beyond a reasonable doubt"). We note that a finding that an error "affects substantial rights" does not mean that it requires automatic reversal under the second prong of the plain error rule. See *People v. Herron*, 215 Ill. 2d 167, 185 (2005) (explaining that both categories of plain

error—errors in a closely balanced case and structural errors that require reversal regardless of their effect on the outcome—"deprive the defendant of substantial rights because both deprive defendant of a fair trial"). We conclude that the potential constitutional violations in this case are subject to harmless error review.

¶ 47 While the harmless error standard for constitutional errors is somewhat stricter than the harmless error standard for evidentiary errors, we only address the constitutional question if the error is not harmless under the constitutional standard. See *In re E.H.*, 224 Ill. 2d 172, 180 (2006) ("Because of the different standards of review, there could theoretically exist a narrow set of cases in which admission of the same evidence is harmless if considered as an evidentiary error, but not harmless if evaluated pursuant to the constitutional error standard."). In considering whether a constitutional violation is harmless, a reviewing court must consider "whether it appears *beyond a reasonable doubt* that the error at issue did not contribute to the verdict obtained." (Emphasis added.) *Patterson*, 217 Ill. 2d at 428. Our supreme court has listed three different approaches for measuring harmless error in this context: (1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other evidence in the case to determine if overwhelming evidence supports the conviction; or (3) determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence. *Id.* For the same reasons supporting our determination that the error is harmless under the evidentiary standard, we find, beyond a reasonable doubt, that any error in admitting

Lorenzo's statement did not contribute to the jury verdict obtained. Any constitutional violation resulting from the admission of Lorenzo's statement is harmless.

¶ 48 *Portions of Charles Wilson's Statements Regarding Lorenzo's Actions After the Crime*

¶ 49 Defendant next contends that any portions of Charles's prior statements describing what Lorenzo did after the crime were irrelevant and highly prejudicial. Defendant concedes that her counsel did not preserve this issue for appeal, and she therefore invokes the plain-error rule. See *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Defendant argues that "a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice" against her. *Id.* (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)). Before we consider whether the evidence was closely balanced, we must determine whether any error occured. *Id.*

¶ 50 "Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. [Citation.] Even when evidence is relevant, it may, in the trial court's discretion, be excluded if its prejudicial effect substantially outweighs its probative value." *People v. Lewis*, 165 Ill. 2d 305, 329 (1995). "In this context, prejudice means 'an undue tendency to suggest decision on an improper basis, commonly an emotional one, such as sympathy, hatred, contempt, or horror.' " *People v. Eyler*, 133 Ill. 2d 173, 218 (1989) (quoting M. Graham, Cleary & Graham's *Handbook of Illinois Evidence* § 403.1 (4th ed. 1984)).

¶ 51 Defendant concedes what Lorenzo did after the shooting—fleeing to Mississippi with Charles, throwing parts of a pearl-handled gun out the car window, and traveling to Miami—tended to prove Lorenzo's consciousness of guilt. The evidence was therefore relevant to show that Lorenzo did in fact shoot Ebenezer at Leona's. We understand that defense counsel plainly acknowledged to the jury that Lorenzo killed Ebenezer and argued that defendant was unaware that Lorenzo had a gun, never planned to rob him, and abandoned her decision to "beat him up." But the fact that a proposition is not being disputed is not determinative in deciding whether it should be admitted. The State "is not disabled at trial from proving every element of the charged offense and every relevant fact, even though the defendant fails to contest an issue or is willing to stipulate to a fact." *People v. Bounds*, 171 Ill. 2d 1, 46-47 (1995). The State was entitled to present evidence that Lorenzo shot Ebenezer.

¶ 52 Even if we view the probative value of the description of Lorenzo's actions after the shooting as minimal, we do not see how it was prejudicial. In this context, evidence is prejudicial where it has an "undue tendency to suggest decision on an improper basis, commonly an emotional one ***." *Eyler*, 133 Ill. 2d at 218. The case relied on by defendant provides a good example. See *People v. Hoerer*, 375 Ill. App. 3d 148, 158 (2007) (finding that, in a trial on charges for involuntary manslaughter and delivery of a controlled substance, the trial court erred in admitting testimony that co-defendant raped a witness on the night in question because description of the "graphic" assault had a tendency to "arous[e] prejudice and hostility on the part of the jury"). By contrast, defendant has not identified how the statements describing Lorenzo's

actions after the shooting had an undue tendency to suggest decision on an improper basis. Upon review of the statements, we find no basis on which they could be considered unfairly prejudicial. The trial court did not abuse its discretion in admitting portions of Charles Wilson's statements that describe what Lorenzo did after the crime. Having found no error in the admission of those statements, there can be no plain error. See *People v. Bannister*, 232 Ill. 2d 52, 79 (2008).

¶ 53 *Charles Wilson's Audiotaped and Written Statements*

¶ 54 Defendant raises one additional claim as to the admissibility of Charles Wilson's prior inconsistent statements. Defendant claims that Charles's audiotaped and written statements should not have been admitted as substantive evidence—in their entirety—because they were unnecessarily duplicative of his grand jury testimony. Defendant argues, first, that the additional statements should have been barred by the rule against prior consistent statements, and second, that the prejudicial effect of the additional statements substantially outweighed their probative value because the statements were cumulative. Defendant concedes that she did not preserve this issue for review and again invokes the plain-error rule.

¶ 55 Defendant's contention that admission of multiple prior inconsistent statements from the same witness violates the rule against prior consistent statements has been addressed at length, and rejected, by this court. See *People v. White*, 2011 IL App (1st) 092852, ¶ 49-54; *People v. Santiago*, 409 Ill. App. 3d 927, 931-34 (2011); *People v. Maldonado*, 398 Ill. App. 3d 401, 423 (2010); *People v. Johnson*, 385 Ill. App. 3d 585, 608 (2008). In this case, defendant raises no

new arguments, and we see no reason to depart from this court's uniform rejection of those arguments in these earlier cases.

¶ 56 Defendant also argues that the trial court abused its discretion in admitting more than one prior inconsistent statement from Charles Wilson because once one prior statement was admitted, the additional statements had little probative value and were unnecessarily cumulative. See *People v. Culbreath*, 343 Ill. App. 3d 998, 1004 (2003) ("[T]he exclusion of cumulative evidence is within the discretion of the trial court, whose ruling will not be reversed absent a clear abuse of that discretion." (quoting *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 495 (2002))); see also Ill. R. Evid. 403 (eff. Jan. 1, 2011) ("Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice *** or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.").

¶ 57 Defendant contends that after the first statement was admitted, the additional prior statements were "cumulative" and unnecessary because they "add[ed] nothing to what was already before the jury." See *People v. Ortiz*, 235 Ill. 2d 319, 335 (2009). We disagree. In this case, Charles repeatedly denied knowledge or memory of making his prior statements (or alternatively claimed that he was under the influence of drugs when he gave the statements). Once one prior statement was admitted, the jury had to assess that statement in light of Charles's claim at trial that he did not make it or was intoxicated at the time. The two additional statements had probative value: the fact that Charles made additional statements at different times to different officials further damaged his claims at trial that he did not make the statements

or was on drugs at the time. *Cf. People v. Harvey*, 366 Ill. App. 3d 910, 922 (2006) (disagreeing with the defendant's claim that admission of additional prior inconsistent statement was cumulative because the evidence "served two distinct purposes": to impeach the witness's credibility and to serve as substantive evidence).

¶ 58 We cannot say that after one prior statement was admitted, confronting Charles with additional prior statements added nothing to what was already before the jury. We conclude that any repetition of the statements did not require their exclusion from evidence. *Cf. People v. Fields*, 285 Ill. App. 3d 1020, 1028 (1996) (finding that even "unnecessary" repetition of witness's prior inconsistent statements did not rise to the level of prejudice). The trial court did not abuse its discretion in admitting Charles's audiotaped and handwritten statements.

¶ 59 *Sentence for First Degree Murder Conviction*

¶ 60 Finally, defendant argues that her 42-year sentence for first degree murder was excessive because the court did not give proper weight to mitigating factors, including her age and lack of criminal history. The trial court has "broad discretionary powers" in sentencing a defendant. *People v. Jones*, 168 Ill. 2d 367, 373 (1995). "Where the sentence chosen by the trial court is within the statutory range permissible for the pertinent criminal offense for which the defendant has been tried and charged, a reviewing court has the power to disturb the sentence only if the trial court abused its discretion in the sentence it imposed." *Id.* at 373-74. In this case, the sentence imposed by the court was within the statutory range for first degree murder, which is 20

to 60 years. 730 ILCS 5/5-8-1(a)(1)(a) (West 2008) (now codified at 730 ILCS 5/5-4.5-20(a) (West 2010)).

¶ 61 "In sentencing a defendant, a trial court must balance the retributive and rehabilitative purposes of the punishment taking into account both the seriousness of the offense and the objective of restoring the offender to useful citizenship." *People v. Cooper*, 283 Ill. App. 3d 86, 95 (1996) (citing *People v. Hernandez*, 278 Ill. App. 3d 545, 555 (1996)); Ill. Const. 1970, art. I, § 11. The trial court may appropriately consider the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age when sentencing a defendant. *People v. Fern*, 189 Ill. 2d 48, 53 (1999). The court may also consider the nature of the crime, protection of the public, deterrence, and punishment. *People v. Jackson*, 357 Ill. App. 3d 313, 329 (2005). "It has been emphasized that the trial court is in a superior position to assess the credibility of the witnesses and to weigh the evidence presented at the sentencing hearing." *Jones*, 168 Ill. 2d at 373.

¶ 62 At the sentencing hearing, the court heard arguments from counsel, a victim impact statement from Ebenezer's fiancée, a statement from defendant, and a statement from Khalid Bilal, the staff chaplain at the jail. Defense counsel reviewed the pre-sentence investigation report and noted that defendant, who was 24 at the time of the crime, had no criminal history, was pursuing her education at the college level, and was a victim of physical and sexual abuse. Mr. Bilal stated that defendant was a studious and caring mother who expressed remorse and recognized the seriousness of the offense. In her statement, defendant apologized to Ebenezer's

family. She then stated that it was Lorenzo and the other men who made the decision to jump out of her car and rob and shoot Ebenezer. Defendant also commented at length that she believed it was unfair that she was being held accountable for what Lorenzo and the other men did.

¶ 63 During the sentencing hearing, the court noted that the victim impact statement was "incredibly profound." The court then commented on the "significant" evidence in mitigation presented by defendant and her counsel. While the court appreciated defendant's effort to apologize, the court was troubled by "the lack of any effort to take responsibility for what eventually happened to Corey Ebeneezer." Based on the evidence presented at trial, the court viewed defendant's "effort to disclaim knowledge and understanding of what was or could occur" as unbelievable. The court found that defendant set in motion a course of events based on an irrational reaction to an employment dispute. The court specifically found that defendant was not a candidate for a minimum sentence and that a sentence of 42 years was "appropriate *** based on the evidence in this case, the defendant's criminal history and background."

¶ 64 Defendant contends that the trial court did not give enough weight to factors in mitigation, especially her age, lack of criminal background, and employment history. The record shows that the court thoroughly considered the mitigating factors presented at the sentencing hearing, but found that the nature of the crime and defendant's role in its execution counseled against imposing the minimum sentence. In the trial court's view, the serious and senseless nature of defendant's actions outweighed the factors in mitigation. The trial court, in its

considerable discretion, made this determination after presiding over the trial and considering the evidence presented at the sentencing hearing. It is not the province of this court to reweigh the sentencing factors, and we may not substitute our judgment for that of the trial court merely because we may have weighed the sentencing factors differently. *People v. Streit*, 142 Ill. 2d 13, 19 (1991); *People v. Coleman*, 166 Ill. 2d 247, 261-62 (1995). The trial court did not abuse its discretion in imposing the sentence.

¶ 65 CONCLUSION

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

¶ 67 Affirmed.