2012 IL App (1st)102475-U

SECOND DIVISION
August 7, 2012

No. 1-10-2475

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. 06 CR 1996
	)	
JOSEPH PETTIS,	)	Honorable
	)	Steven J. Goebel,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CONNORS delivered the judgment of the court.
Presiding Justice Quinn and Justice Harris concurred in the judgment.

O R D E R

***Held*:** State did not violate rules of evidence by introducing prior inconsistent statements of witnesses who recanted their prior statements on the witness stand; State did not violate rules of hearsay by introducing prior witness identification statements; State did not commit reversible error by suggesting that certain witnesses changed their stories out of fear; and there was not a disproportionate sentence given to defendant, as compared to his codefendants.

¶ 1 Defendant Joseph Pettis was convicted by a jury of first-degree murder and sentenced to 65 years in prison. On appeal, defendant contends that: (1) he was denied a fair trial where the State introduced as substantive evidence multiple prior statements of three key witnesses in violation of the evidentiary rules, (2) he was denied a fair trial where the State introduced repetitive hearsay identification evidence, (3) he was denied a fair trial where the State argued that the witnesses recanted their prior statements at trial out of fear, and that the incident occurred in a "bad neighborhood," (4) there was a disproportionate disparity between the sentences of defendant and his codefendant, and (5) his mittimus should be amended to reflect only one conviction for first-degree murder. For the following reasons, we affirm defendant's conviction and correct the mittimus.

¶ 2 I. BACKGROUND

¶ 3 Defendant, along with codefendants Jason McCray and Michael Ferguson, was charged with first-degree murder in connection with the shooting death of the victim, John Kennedy. Defendant and codefendants were also each charged with personally discharging a firearm during the commission of the murder, among other charges not at issue in this case. Defendant was tried separately from codefendants, and thus they are not parties to this appeal.

¶ 4 Five occurrence witnesses testified on behalf of the State: Danielle Thomas, Latasha Walton, Lamar Gray, Vernon Commings, and Jonathan Miller. Thomas testified that on August 24, 2005, at approximately 8 p.m., she was leaving her apartment building to go out for the evening. The apartment building was located at 3711 West Arthington and was a U-shaped complex with a courtyard in the middle. Thomas testified that she saw the victim in the

courtyard on the night in question. When she returned home between 12:30 a.m and 1 a.m., there were about 20 people in the courtyard, including her roommate, Latasha Walton, who was sitting on a stump using her cell phone. The victim was sitting on the other side of the stump. Jonathan Miller, Lamar Gray, and Vernon Commings were all playing dice in the courtyard.

¶ 5 As Thomas was walking through the courtyard she saw McCray, Ferguson, and defendant approaching the apartment building. Thomas began walking up the stairs of the apartment building. As she got to the third floor, she heard people running up the stairs. She turned and saw Miller and Gray. Miller said he had been shot and was limping. Thomas went to the front of the building and saw the victim laying on the ground, hyperventilating, with blood running from his body.

¶ 6 Thomas testified that she did not speak to the police that night because she was angry at the police for not helping the victim after he had been shot. She was arrested on August 28, 2005, in connection with a narcotics case, at which point she spoke to the police about the incident in question. At that time, she identified Ferguson (also known as "Rudy") and defendant. Thomas testified that she spoke to the police about the incident because she thought she would receive leniency on her drug case, but she did not.

¶ 7 Latasha Walton, Thomas' roommate, testified next for the State. She stated that on the night in question, she was outside of her building talking on her cell phone. As she was talking on her phone, a "little kid" named Tobias approached the group of men playing dice. Tobias told Miller and Commings that he "got into it" with some other men. Walton then saw three men approaching the group. The three men exchanged words with the group playing dice. The victim

approached and tried to calm things down, and told the three men to leave. The three men then left.

¶ 8 Walton was still on her cell phone when she saw the three men return later with guns. She heard one of the men say "this is how we get down," and then all three of the men pulled out their guns. She described one of the guns as a long black gun with brown wood, and the other two guns as small and black. Walton ran from the scene, but heard 10 gunshots as she was running up the stairs of the apartment building. She went back downstairs and saw the victim breathing before he died. Walton testified that she did not speak to police that night because she was scared.

¶ 9 On August 28, 2005, after Thomas identified Walton as being present on the night in question, the police went to Walton's apartment building and asked to speak to her about the shooting. After looking at several photographs, Walton identified the person who had been carrying the "long gun" as McCray.

¶ 10 On October 9, 2005, Walton went to the Area 4 police station and viewed a lineup. She told police that she could not identify anyone in the lineup and then began to cry. She told police that she was crying because she was scared and "didn't want to be part of this." A female detective was able to calm her down, at which point Walton admitted that she did recognize one of the men in the lineup. She then identified McCray.

¶ 11 On October 19, 2005, Walton viewed another lineup but was unable to identify anyone. On December 19, 2005, Walton viewed a third lineup, where all of the men, including defendant, were wearing skullcaps. She asked if defendant's hat could be removed, but her request was

denied. She did not identify anyone in that lineup.

¶ 12 Michael Humilier, a Cook County deputy medical examiner, conducted an autopsy of the victim on August 25, 2005. He found 15 gunshot entrance wounds and recovered 9 bullets from the victim's body. One of the bullets recovered was consistent with a rifle round, and the others were consistent with handgun rounds.

¶ 13 Chicago Police Officer Paul Malachesen, who was working as an evidence technician on the night in question, recovered 14 expended cartridge cases, and two fired rounds, on the sidewalk at the scene of the murder.

¶ 14 Kris Rastrelli, an expert in the field of firearms identification, examined the recovered evidence. She determined that four cartridge cases were fired from the same rifle. She would expect that the 10 other cartridge cases were fired from the same semi-automatic weapon, and the two fired bullets were fired from the same gun. Several of the bullets recovered from the victim's body were fired from the same firearm and could have been fired from a 9mm handgun. Two of the fired bullets were a .38 caliber or .357 caliber bullet, but were not fired from the same firearm as the other bullets. They were inconclusive as to each other. Rastrelli also determined that one of the bullets was a .30 caliber bullet and would have been fired from a rifle. In her expert opinion, there were three guns used in the incident.

¶ 15 Chicago Police Detective Kevin Bor was assigned to investigate this case, along with his partner, Detective Pat Golden. On August 28, 2005, Bor and Golden spoke with Tyrone Lemon, who was not an eyewitness to the shooting, but who gave them information about the murder. Based on that information, the detectives showed Lemon a photograph, which Lemon identified

as that of Ferguson. Later that same evening, the detectives spoke with Thomas, who was in custody for a narcotics case. She was able to give them some information, as well as to identify a photograph of McCray. She also identified a photo of Gray, who was present on the night in question, and told them that Walton was also present on the night in question.

¶ 16 The detectives then spoke to Gray and assembled a photo array that included photos of McCray and defendant. Gray identified defendant as the person armed with the 9mm handgun who shot at the victim. Gray identified McCray as the person armed with a rifle who shot at the victim, and Ferguson as the person who said "this is how we people get down," before shots were fired.

¶ 17 On October 9, 2005, Assistant State's Attorney (ASA) Paul Chevlin interviewed Gray at the police station. Gray was not under arrest or handcuffed. He told ASA Chevlin that he wanted to talk, and agreed to have his statement reduced to writing. While ASA Chevlin was writing out Gray's statement, Gray identified various offenders involved in the incident by their photographs.

¶ 18 In his handwritten statement, Gray indicated that he was playing dice on the night in question with the victim, Miller, and Commings. He saw a boy named Tobias arguing with three other men after Tobias asked them for a cigarette. Gray identified the three men as Ferguson (also known as "Rudy"), defendant, and McCray. The victim approached the three men and told them that "they should be chasing pussy instead of fucking with shorty." Defendant told the victim, "you disrespected us, like we don't get pussy." Defendant, Ferguson, and McCray then walked away.

¶ 19 Gray stated that about twenty minutes later, the three men walked back up to them. Ferguson stated, "this is how me and my people get down." Gray saw defendant carrying a 9mm handgun while McCray was carrying a rifle. As soon as he saw the guns, Gray ran away and saw Miller running behind him. They ran into the building, and then came back out ten minutes later to see that the victim had been shot.

¶ 20 Detective Bor testified that on October 26, 2005, Gray viewed a lineup. He identified Ferguson as the person that stated "this is how my people or this is how we people get down."

¶ 21 ASA Maureen Lynch met with Gray on October 26, 2005. He admitted to her that he had given a prior handwritten statement. Gray agreed to testify before a grand jury. Gray's testimony before the grand jury was consistent with his handwritten statement.

¶ 22 Investigator Kim Miller testified that she was working with Ferguson's counsel, Assistant Public Defendant (APD) Bernard Okitipi, and the two spoke with Gray while he was in jail on an unrelated drug charge on March 3, 2009. Gray provided Kim Miller with a written statement that day, which was substantially similar to his earlier statement, and that given to the grand jury.

¶ 23 At trial, however, Gray testified that he was not at the scene of the shooting, and denied giving a statement to a prosecutor, denied giving a written statement to anyone at the Public Defender's Office, and denied testifying in front of a grand jury. At the time of trial, Gray had five felony drug convictions and was in prison. Gray was then impeached with his prior statements.

¶ 24 Vernon Commings was in jail on a pending felony drug charge at the time of trial. He testified that on the night in question he was shooting dice in the courtyard with the victim, Gray,

and Miller, and that they were drinking, smoking marijuana, and taking ecstasy. Tobias ran up and said he had an argument with some other men. Commings testified that after that, Ferguson walked up alone. Commings denied seeing defendant at the scene and testified that he left the courtyard and entered a different building when he heard gunshots.

¶ 25 Like Gray, Commings was then impeached with an October 26, 2005, handwritten statement and testimony in which had identified photographs of defendant, McCray, and Ferguson as the people he saw together shortly before the shooting.

¶ 26 Commings testified at trial that he only provided a handwritten statement to police because he felt that he would not be allowed to leave the police station until he gave a statement, and that he "told them what they wanted to hear." Commings stated that two or three police officers had threatened to make it harder for him to sell drugs on the street in the future if he did not cooperate, and that they would charge him with violating his parole. ASA Kreuger and Detective Carroll denied that Commings only told them what they wanted to hear, and denied that they threatened to charge him with violating his parole or to make it harder for him to sell drugs if he did not give a handwritten statement.

¶ 27 At trial, Commings identified a photograph of Ferguson that was attached to his prior handwritten statement, but could not identify the photographs of defendant and McCray. Commings acknowledged that he had previously signed the photograph of defendant, but again denied that he saw defendant at the scene on the night in question.

¶ 28 The State then impeached Commings with his testimony from a hearing on March 17, 2009, in which he identified the photographs of defendant and McCray.

¶ 29 At trial, Miller testified that he was currently in jail and had three felony convictions. He testified that on the night in question he was hanging out with some friends in the courtyard of an apartment building in Arthington. Commings, the victim, and Tobias were all there. Tobias was crying and upset. Miller admitted to seeing Ferguson, defendant, and McCray that night. Miller testified, however, that the three men did not talk to the victim, and left the area on their own. Later they returned, and Miller saw McCray carrying a long black gun. Miller did not see anything in defendant's hands. He testified that he did not know where defendant and Ferguson were when McCray pulled the gun out, because he ran. Miller testified that he did not see who shot a gun, and he did not hear anybody say anything to the victim before or after the gun shots. Miller was shot in the left calf during the shooting.

¶ 30 Miller identified photographs of McCray, Ferguson, and defendant at trial, but testified that he did no know their names at the time of the incident. Miller was then impeached with testimony from police officers which revealed that on August 29, 2005, Miller viewed two photo arrays and identified photographs of Ferguson, McCray, and defendant as the three men who approached the courtyard on the night in question.

¶ 31 Miller was also impeached by the handwritten statement that he gave on November 26, 2005, in which he stated that defendant, McCray, and Ferguson returned to the courtyard on the night in question and told the victim "this is how my people get down." Miller also stated that he started to run and when he looked back he saw one of the men shoot the victim and the victim fall to the ground. Miller picked Ferguson out of a lineup as the person who was at the scene with defendant McCray.

¶ 32 Miller was impeached with his testimony before a grand jury on December 8, 2005, where he stated that Tobias approached the victim, followed by Ferguson, McCray, and defendant, and that the victim exchanged words with the three men. The three men then left and returned 15 minutes later, where one of them said "this is how my people get down," and then Miller ran when he saw McCray's rifle. He turned as he was running and saw McCray fire his rifle.

¶ 33 Miller was further impeached with a statement he gave on November 13, 2007, when he told Assistant Public Defenders (APD) Joanne Rosado and Bernard Okitipi that the victim saw Tobias arguing with defendant, McCray, and Ferguson, and told the men to leave Tobias alone. The men then left, only to return ten minutes later. Miller told the APDs that McCray had a gun and defendant told the victim that the victim disrespected him.

¶ 34 Following the conclusion of all of the testimony, the jury found defendant guilty of first degree murder and personally discharging a firearm.

¶ 35 At the sentencing hearing, the State called two witnesses. Officer Roger Guerra testified that he was assigned to the Cook County Sheriff's Department as a member of the emergency response team, which conducts searches through the jail. On November 19, 2009, Officer Guerra conducted a search in the disciplinary segregation tier of the jail, where defendant was housed due to disciplinary issues. Officer Guerra found a sharp metal object in the toilet bowl of defendant's cell.

¶ 36 Officer Kenneth Vargas testified that on November 14, 2009, he did a search of defendant's cell and found a sharpened piece of metal, approximately seven inches in length, that

was wrapped up in bed sheets and secured under the bottom bunk bed with toothpaste.

¶ 37 The State then read two impact statements - one from the victim's sister, and one from the victim's son.

¶ 38 In mitigation, defense counsel highlighted the fact that defendant's mother was at every court date for the past four years. Defense counsel also noted that while defendant had five prior felony convictions, none of them were violent in nature, and that this was the first violent crime he had been involved in.

¶ 39 The trial court then stated that it had considered the factors in aggravation and mitigation, and that it had reviewed the presentence investigation and considered the arguments of counsel. The trial court noted that defendant had a long criminal record, and then sentenced him to 45 years for the murder of the victim. The trial court further noted that the jury had found that defendant personally discharged a firearm, and therefore 20 years were to be added to defendant's sentence. The sentences were to be served consecutively.

¶ 40 Defendant filed a motion to reconsider his sentence. At the hearing on that motion, he argued that he received substantially more time than codefendant McCray. Defendant received 45 years for first-degree murder while McCray received 32 years. The trial court stated that the difference was based on the factual participation as well as defendant's background, and denied defendant's motion to reconsider.

¶ 41 II. ANALYSIS

¶ 42 A. Admissibility of Witnesses' Prior Statements

¶ 43 Defendant's first argument on appeal is that the trial court erred in admitting the prior

statements of Miller, Gray, and Commings as substantive evidence. As an initial matter, defendant concedes that the evidence of prior statements were admitted without objection. Nevertheless, he urges us to review this issue for plain error. We may review an unpreserved error pursuant to the plain error doctrine when either (1) the evidence is closely balanced and the error alone threatens to tip the scales of justice against him, or (2) the error is so serious that it affects the fairness of the trial and challenges the integrity of the judicial process. *People v. Piatowski*, 225 Ill. 2d 551, 564 (2007) (citing *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. *Piatowski*, 225 Ill. 2d at 564.

¶ 44 Three of the State's occurrence witnesses had previously implicated defendant in the shooting through prior handwritten statements and grand jury testimony. While on the stand at trial, each witness recanted his prior statements implicating defendant, and claimed not to recall what happened on the day in question, or claimed not to have seen defendant at the scene on the day in question. Upon each recantation, the State then introduced evidence of their prior statements.

¶ 45 For Gray, the State introduced evidence of Gray's written statement that was made on October 9, 2005, his grand jury testimony that was made on October 26, 2005, and a written statement that had been provided to a public defender on March 3, 2009. For Commings, the State introduced evidence that he provided a written statement and had identified photographs of Ferguson, McCray, and defendant as the three men who followed Tobias to the building. ASA Kreuger also testified that Commings identified those photographs as the three men he saw

following Tobias. For Miller, the State introduced evidence that Detective Bor was present when Miller told the prosecutor that Ferguson, McCray, and defendant returned to the scene and that one of them said "this is how we get down," and then saw McCray shoot the victim. The State also introduced Miller's grand jury testimony from December 8, 2005, as well as APD Rosado's testimony that Miller said the victim was arguing with three men, and that McCray was carrying a gun, and that defendant told the victim that he had disrespected them.

¶ 46 Defendant notes that the statements were admitted as substantive evidence pursuant to section 115-10.1 of the Code of Criminal Procedure of 1963 (Code), which provides that evidence of a statement made by a witness is not made inadmissible by the hearsay rule if: (1) the statement is inconsistent with his testimony at the trial, (2) the witness is subject to cross examination concerning the statement, and (3) the statement was made under oath at a trial, hearing or other proceeding, or if the statement narrates, describes, or explains an event of which the witness had personal knowledge and the statement is proved to have been written or signed by the witness. 725 ILCS 5/115-10.1(a), (b), (c)(1), (2)(A) (West 2010).

¶ 47 Defendant admits that each statement introduced meets the above requirements, yet contends that the admission of *multiple* prior inconsistent statements from each witness constituted reversible error for two reason: (1) the prior inconsistent statements of each witness, while individually inconsistent with the trial testimony, were consistent with each other, and therefore violated the common-law rule against corroboration of substantive evidence through prior consistent statements, and (2) the additional prior consistent statements should have been excluded as simply cumulative of the first prior statement that was introduced.

¶ 48 1. Prior Inconsistent Statements

¶ 49 This court has 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. *People v. Maldonado*, 398 Ill. App. 3d 401, 423 (2010). Both parties agree with the general proposition that where, as here, a witness testifies at trial that he does not remember what happened on the night of a shooting, or has never seen the defendant, 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. *Maldonado*, 398 Ill. App. 3d at 423. 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 42.

¶ 50 Defendant nevertheless argues 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. As stated above, each out-of-court statement is to be compared to the trial testimony for purposes of determining whether the statement is consistent or inconsistent. Defendant's argument assumes that when a prior inconsistent statement is admitted as substantive evidence, it replaces the witness' in-court testimony. However, that is not the effect of the substantive admission of a prior inconsistent statement. *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). Rather, a substantive admission of a prior inconsistent statement may be considered the same as the witness's "direct" testimony (*People v. McCarter*, 2011 IL App (1st) 092864, ¶ 23), but may not replace the in-court testimony. It is viewed as direct evidence, the same as the defendant's in-court testimony is viewed as direct evidence, and it is up to the trier of fact to weigh all the substantive evidence and decide which version of events to believe.

¶ 51 Prior inconsistent statements that are allowed in as substantive evidence under section 115-10.1 are always to be compared with the actual in-court testimony, not with other prior inconsistent statements that have become substantive evidence by virtue of their inconsistency with the actual in-court testimony. See *Maldonado*, 398 Ill. App. 3d at 423 (admissibility under section 115-10.1 is determined by comparing the out-of-court statement with the trial testimony). Accordingly, it was proper for the State to introduce more than one prior inconsistent statement to contradict the witnesses' in-court trial testimony. In fact, we have upheld this very proposition several times. See *People v. Perry*, 2011 IL App (1st) 081228, ¶83-87; *Maldonado*, 398 Ill. App. 3d at 423; *People v. Johnson*, 385 Ill. App. 3d 585, 606-09 (2008) (the introduction of multiple statements that are inconsistent with the trial testimony, but consistent with each other, is proper).

¶ 52 Because we find that the introduction of several prior inconsistent statements under section 115-10.1 is proper, we therefore find that defendant's reliance on *People v. Dabbs*, 239 Ill. 2d 277 (2010), is misplaced. Defendant is correct that *Dabbs* stands for the proposition that a

statutory exception, like section 115-10.1, does not nullify other common-law rules. *Dabbs*, 239 Ill. 2d at 288. However, as we noted above, a prior inconsistent statement admitted as substantive evidence pursuant to section 115-10.1 does not replace a witness' in-court testimony. Rather, the admissibility of such evidence depends upon a comparison of the out-of-court statement to the actual in-court testimony. Therefore, the admission of several section 115-10.1 statements, each inconsistent with a witness' trial testimony, does not nullify the common law rule against admission of prior consistent statements.

¶ 53 Accordingly, because there was no error in the admission of the evidence, there can be no plain error, and we must honor defendants' procedural default. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶ 54 2. Cumulative Evidence

¶ 55 Defendant also makes the argument that the introduction of several prior inconsistent statements pursuant to section 115-10.1 violates the common-law rule against introduction of cumulative evidence. Defendant cites to *People v. McWhite*, 399 Ill. App. 3d 637, 641 (2010), for this proposition. However, the court in *McWhite* discussed the reasoning behind the general prohibition into evidence of prior *consistent* statements. As we discussed above, prior inconsistent statements introduced under section 115-10.1 do not become consistent statements because they are not compared to each other, but rather to the actual in-court testimony.

¶ 56 Defendant also cites to *People v. Bedoya*, 325 Ill. App. 3d 926, 940-41 (2001), for the proposition that cumulative evidence, even where relevant, may be more prejudicial than probative. While *Bedoya* certainly states that cumulative evidence can be prejudicial, defendant

fails to explain or argue why the introduction of several statements under section 115-10.1 amounted to cumulative, prejudicial evidence. Rather, defendant merely states: "cumulative evidence - even where relevant - is generally barred because the prejudicial effect of needlessly repetitive evidence substantially outweighs its probative value," and cites to *Bedoya*. We find no such statement in *Bedoya*, and note that *Bedoya* analyzed repetitive "other offense" evidence, not statements properly introduced under section 115-10.1. Accordingly, that argument is waived. *People v. Greer*, 336 Ill. App. 3d 965, 979 (2003) (failure to cite to authority in support of arguments, and any issues not sufficiently or properly presented on review, are waived).

¶ 57 B. Witnesses' Identification Testimony

¶ 58 Defendant's next argument on appeal is that the he was denied a fair trial where the State introduced repetitive hearsay evidence of the witnesses' prior identifications of Ferguson and McCray, defendant's codefendants who were not on trial. Defendant contends that the identification testimony of Ferguson and McCray were not necessary to establish any fact of consequence at defendant's trial, and only served to improperly bolster the identification statements made by Gray and Miller, which comprised the only substantive evidence linking defendant to Ferguson and McCray at the time of the shooting.

¶ 59 The State responds that the trial court properly admitted evidence that certain witnesses had previously identified the two codefendants under section 115-12 of the Code. 725 ILCS 5/115-12 (West 2008).

¶ 60 As an initial matter, defendant admits that he did not preserve this issue on appeal because he did not object to the admissions of each witness's prior identifications of Ferguson

and McCray at trial. However, defendant once again urges us to review this issue for plain error, and as stated above, the first step in a plain-error analysis is to determine whether there was error at all. See *Piatowski*, 225 Ill. 2d at 564.

¶ 61 Defendant takes issue with certain identification statements made by each of the State's five witnesses. Thomas identified photographs of Ferguson and McCray in court, and testimony was introduced that she identified the same photographs at the police station on August 28, 2005. Walton testified that she identified McCray in a photo array as the man with a rifle, and later identified McCray in a lineup. Gray did not identify any codefendants at trial, but in his written statement read by ASA Chevlin, he identified photographs of Ferguson and McCray. Gray also identified McCray in a lineup, as well as photographs of Ferguson and Miller in front of the grand jury. Commings identified a photograph of Ferguson in court, and the State elicited testimony that he had earlier identified Ferguson in a lineup. ASA Krueger testified that Commings identified both Ferguson and McCray while making his handwritten statement. Miller identified photographs of both Ferguson and McCray in court. The State then elicited testimony that Miller identified the same photographs while providing his written statement, and during his grand jury testimony.

¶ 62 In addition to the five occurrence witnesses, Assistant State's Attorneys, Assistant Public Defenders, and police officers testified as to what the occurrence witnesses had told them, and how the investigation progressed. Throughout the testimony, witnesses testified as to when and how defendant and codefendants were identified.

¶ 63 Defendant contends that allowing identification evidence of Ferguson and McCray into

evidence under section 115-12 of the Code was improper because section 115-12 only applies to prior identification evidence of a defendant, and McCray and Ferguson were codefendants. Additionally, defendant contends that even if section 115-12 applied to codefendants, introduction of several identifications of the codefendants violated other rules of evidence.

¶ 64 Section 115-12 of the Code dictates that a statement is not rendered inadmissible by the hearsay rule if (1) the declarant testifies at trial, and (b) the declarant is subject to cross-examination concerning the statement, and (c) the statement is one of identification of a person made after perceiving him. 725 ILCS 5/115-12 (West 2008).

¶ 65 Here, as defendant admits, each of the witnesses in question testified at trial, were subject to cross-examination concerning the out-of-court statement, and each of the statements was one of identification of a person. However, defendant contends that this exception to the hearsay rule only applies to statements identifying the defendant in a case, not codefendants. Defendant relies on *People v Lewis*, 165 Ill. 2d 305 (1995), for this proposition. In *Lewis*, our supreme court states that section 115-12 "is designed to permit the use of prior consistent out-of-court statements as corroborative or substantive evidence of a witness' prior identity of a defendant." *Lewis*, 165 Ill. 2d at 343. Defendant argues that while the State may be able to elicit in-court identifications of Ferguson and McCray from the witnesses, it is not permitted to then introduce prior consistent statements of identification since neither Ferguson or McCray was the defendant on trial.

¶ 66 The State responds, and we agree, that there is simply nothing in the statute that limits its applicability to statements identifying the defendant on trial. The statute clearly states that the

statement must be "one of identification of a *person* made after perceiving him." 725 ILCS 5/115-12(c) (West 2008) (emphasis added). The statute does not say a defendant, or even a party, but rather a person. Moreover, in *People v. Emerson*, 189 Ill. 2d 436, 480-81 (2000), our supreme court found that an officer's testimony about a witness who had been stabbed fell squarely within section 115-12's statutory exception when the declarant (the witness) testified at the eligibility hearing, and the defense had an opportunity to cross-examine him about his statement identifying the defendant *and the codefendant* as the individuals who had just stabbed and robbed him. *Emerson*, 189 Ill. 2d at 480-81 (Emphasis added).

¶ 67 Because we can find no authority limiting section 115-12 to statements identifying the defendant, nor does defendant point to any such authority, we therefore find that the prior identification statements made by certain witnesses identifying codefendants McCray and Ferguson were properly admitted pursuant to section 115-12.

¶ 68 Defendant nevertheless argues that even if the prior statements were admissible under section 115-12 as to codefendants, there is no evidentiary rule that allows for the introduction of "dozens of prior, out-of-court, and consistent statements." Section 115-12 permits the admission of prior consistent identification statements as both corroborative and substantive evidence. *People v. Bowen*, 298 Ill. App. 3d 829, 834 (1998); *People v. Davis*, 137 Ill. App. 3d 769, 771-72 (1985). Section 115-12 "on its face permits the substantive admission of prior identification statements without regard to whether the witness makes an in-court identification." *Bowen*, 298 Ill. App. 3d at 834. There are certainly no limitations in the statute indicating how many statements of identification can be admitted pursuant to section 115-12. Each statement, like

those admitted under section 115-10, is admitted according to whether it meets the statutory requirements, and as compared to each witness' actual in-court testimony.

¶ 69 Accordingly, because there was no error in the admission of the evidence, there can be no plain error, and we must honor defendants' procedural default. *People v. Hillier*, 237 Ill. 2d at 545.

¶ 70 C. Prosecutorial Misconduct

¶ 71 Defendant's next argument is that he was prejudiced by the prosecutor's statements that were made during opening statements and closing and rebuttal arguments. Specifically, defendant claims that the State improperly suggested to the jury that three witnesses changed their stories on the witness stand out of fear and because they held grudges against law enforcement, and that the State inflamed the passions of the jury by encouraging the jury to send a message.

¶ 72 1. Plain Error

¶ 73 As an initial matter, defendant concedes that he has forfeited these issues as they were neither objected to at trial, nor included in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (both a trial objection and a written posttrial motion raising the issue are required to preserve errors). Defendant once again asks us to review this issue for plain error.

¶ 74 2. State's Closing Argument

¶ 75 Defendant contends that he was denied a fair trial due to improper comments made by the prosecutor during closing arguments. We disagree.

¶ 76 It is well-established that a prosecutor has wide latitude in making a closing argument.

People v. Blue, 189 Ill. 2d 99, 127 (2000). In closing, the prosecutor may comment on the evidence and any fair, reasonable inferences it yields, even if such inferences reflect negatively on the defendant. *People v. Pasch*, 152 Ill. 2d 133, 184 (1992); *People v. Holman*, 103 Ill. 2d 133, 163 (1984). When reviewing a challenge to remarks made by the prosecution during closing argument, the comments must be considered in context of the entire closing arguments made by both parties. *People v. Wiley*, 165 Ill. 2d 259 (1995). A reviewing court will not reverse a jury's verdict based upon improper remarks made during closing arguments unless the comments were of such magnitude that they resulted in substantial prejudice to defendant and constituted a material factor in his conviction. *People v. Griffin*, 368 Ill. App. 3d 369, 376 (2006).

¶ 77 We note that our appellate courts are divided on the standard of review of claimed erros in closing remarks. *People v. Maldonado*, 402 Ill. App. 3d 411, 421 (2010). The division stems from an apparent conflict between *People v. Wheeler*, 226 Ill. 2d 92 (2007), which held that whether a prosecutor's remarks were so egregious as to require a new trial presented a question of law to which the *de novo* standard of review was applicable, and *People v. Blue*, 189 Ill. 2d 99 (2000), which applied the abuse of discretion standard to review of the prosecutor's remarks. While noting the conflict, this appellate court district has declined to determine the appropriate standard, where the result would be the same regardless of which standard was applied. *People v. Anderson*, 407 Ill. App. 3d 662, 675 (2011); *Maldonado*, 402 Ill. App. 3d at 422. As we would reach the same conclusion under either standard, we will refrain from articulating the applicable standard until our supreme court resolves the conflict.

¶ 78 Defendant initially claims that the prosecution improperly suggested that three of the key witnesses changed their stories at trial because they held a grudge against law enforcement officers, and they were afraid of people in their neighborhood. Specifically, the prosecution was discussing the witnesses' motives for lying on the stand, and stated that since this incident happened in 2005, all three witnesses have had felony convictions against them. The prosecutor stated that Gray had four convictions since 2005, Miller had three, and Commings had one felony conviction. The prosecutor continued:

> "They don't like the police as a result of every single one of these felony convictions they have had to deal with the police, who are the ones who arrested them, and for every single one of these felony convictions, it's the State's Attorney's Office that has convicted them. They don't like the State's Attorney's Office either."

¶ 79 The prosecutor continued:

> "So to come here in open court facing somebody that they saw or they at least heard fire those multiple amount of bullets along with two other cohorts, of course, they are not going to want to come here and testify."

¶ 80 The prosecutor noted that even "harden[ed] felons" would have understood and respected how much of a horror the murder was, but that after years pile up, memories start to fade, and the freshness and the horror start to disappear. They are around other felons and, unlike when they were able to say the "truth in the safety and the privacy and the protection of a police station or a grand jury, here they have to come out here in open court facing the man that they saw pumping

[the victim] full of bullets with two other cohorts. *** They have to go back to those neighborhoods. They don't want to be known as a snitch. They know what kind of people hang out there."

¶ 81 Finally, in rebuttal, the prosecutor stated:

> ¶ 82 "These are people who are scared. This is a neighborhood where you don't cooperate with the police, which is why there were 15 to 20 people out there [on the day in question] and so few of them have been witnesses and no one comes forward, and that's the reason that these murders can occur brazenly like that in front of 15 to 20 people."

¶ 83 Defendant argues that these statements made by the State during closing argument and rebuttal argument, were purely speculative and not based on the evidence. Defendant contends that there was no evidence presented as to what motivated the three witnesses to testify as they did at trial, and the State had no proper basis to argue that the three witnesses lied at trial out of fear or out of anger toward law enforcement officers. The State responds that the remarks were properly based on the evidence at trial, or reasonable inferences therefrom. We agree with the State.

¶ 84 In *People v. Knott*, 224 Ill. App. 3d 236, 259 (1991) (overruled on other grounds), the court found that there was some validity to the State's argument that the crime involved the use of a deadly weapon and that any rational person would have reservations about testifying in a case such as that one, especially since the defendant was a neighbor of the witness. Moreover, the court found that the comment did not specifically point to the defendant as the instigator of the

fear. *Knott*, 224 Ill. App. 3d at 259. Similarly in the case at bar, the prosecutor's comments did not specifically implicate defendant as the one to strike fear into the witnesses, and the incident happened in the witnesses' neighborhood.

¶ 85 In *People v. Cox*, 37 Ill. App. 3d 690, 708 (2007), the prosecutor commented that two of the witnesses had to continue living in the community where the shooting occurred. The court found that the comments merely implied fear on the part of the two witnesses. *Id*. Similarly in *People v. Walker*, 230 Ill. App. 3d 377, 399 (1992), the prosecutor stated that people who witness a crime come in to court at the risk of their own lives when they can be found. The court found that the comment was not prejudicial because it was not highlighted, repeated, or otherwise emphasized. *Walker*, 230 Ill. App. 3d at 400. Furthermore, any prejudicial impact was minimized by the fact that the witness's fright was not specifically attributed to the defendant. *Id*.

¶ 86 Similarly here, the State did not specifically attribute any fear on the part of the three witnesses to defendant. Rather, it argued that the witnesses had to go back to their neighborhood where the crime had occurred and that such violence impacts the community. Furthermore, because the excerpted portions are the State's only references to the witnesses' alleged fear, the comments were not highlighted, repeated, or otherwise emphasized. *Walker*, 230 Ill. App. 3d at 400; *Cox*, 377 Ill. App. 3d at 708.

¶ 87 Moreover, even if we were to conclude that the prosecutor's remarks were made in error, such putative error does not satisfy either prong of the plain error doctrine. See *People v. Nicholas*, 218 Ill. 2d 104, 122 (2005). The evidence against defendant was strong, and the statements made by the prosecutor were brief and not repeated. Further, the trial court cautioned

the jury before closing arguments that what the attorneys say during argument is not to be considered evidence. The trial court noted that what they could consider was "reasonable inferences, arguments based on reasonable inferences to be drawn from [the evidence]." We find that the remarks here were isolated and did not affect the fairness of trial or amount to prejudice to defendant. See *Nichola*s, 218 Ill. 2d at 123.

¶ 88 3. Jury Distraction

¶ 89 Defendant's next argument is that the State improperly inflamed the jurors' emotions and distracted the jury from the question of defendant's guilt or innocence by repeatedly referring to the "bad neighborhood" in which the shooting occurred, and urging the jury to do justice by rendering a guilty verdict. The complained-of comments are cited below, in their proper context.

¶ 90 Opening Statement

¶ 91 During opening arguments, the prosecutor told the jury what it could expect to hear throughout the trial. Defendant takes issue with the following portion of the State's opening argument:

> "It's summer, about 1:30 in the morning, and people were hanging out in that area; shooting dice, chatting on their phones, hanging out. You're going to hear about the kind of people who are hanging out on the west side about 1:30 in the morning. As you can imagine, many of them have felony convictions, they are not working people, they are the kind of people who have been locked up in jail. All the working people are at home in bed and have to be up for work the next day."

¶ 92 The prosecutor then went on to give an overview of what happened on the night in question, and stated that as soon as guns were drawn, everybody ran:

> "Those are the witnesses you're going to hear from, the people who were out there and ran when they saw those guns. You can imag[ine] those areas of the city where people don't want to be seen cooperating with the police. When a squad car pulls up, you lock the doors and stay inside. No one came forward that night and said what they saw."

¶ 93 We first note that improper remarks generally do not constitute reversible error unless they result in substantial prejudice to the accused. *People v. Coleman*, 158 Ill. 2d 319, 348-49 (1994). Prosecutors are allowed a great deal of latitude in making opening and closing arguments, and although the prosecutor's remarks may sometimes exceed the bounds of proper comment, the verdict must not be disturbed unless it can be said that the remarks resulted in substantial prejudice to the accused. *Coleman*, 158 Ill. 2d at 347. In opening statements, the prosecution is allowed to comment on what the expected evidence will be and reasonable inferences therefrom. *People v. Cloutier*, 156 Ill. 2d 483, 507 (1993).

¶ 94 Defendant contends, citing *People v. Johnston*, 267 Ill. App. 3d 526, 536 (1994), that the complained-of opening statements were improper because they concerned matters that the State would not or could not prove at trial. In *Johnston*, the defendant objected to the following statement:

> "Just like a pack of wolves goes after a deer. All the wolves participate in the dragging and slowing, wearing that deer out."

¶ 95 The *Johnston* court found that the remark was improper because "any analogy, much less one involving animal imagery, is inappropriate because it cannot precisely match what the prosecutor's statements should be limited too [*sic*] - the evidence in the case and the logical inferences that can be drawn from it." *Johnston*, 267 Ill. App. 3d at 536. However, the court found that even though the remark was improper, it was not substantially prejudicial against the defendant. *Id.*

¶ 96 In the case at bar, the complained-of remarks did not involve imagery or analogies. It was limited to the evidence in the case and logical inferences that could be drawn from such evidence. The evidence showed that several of the witnesses were playing dice at 1:30 in the morning on the night in question, that they had felony convictions, and that no one voluntarily spoke to the police after the incident. Moreover, the jury was instructed that "[o]pening statements are not evidence and should not be considered by you as evidence. It's a statement by an attorney of what they expect the evidence to show." See *People. Paige*, 156 Ill. 2d 258, 276 (1993). We find no impropriety in the prosecutor's opening remarks.

¶ 97 Closing Argument

¶ 98 During closing argument, the state noted that there were different neighborhoods that comprised Chicago, and that the neighborhood in which the murder in question occurred, was a "bad neighborhood." Specifically, the prosecutor stated:

> "The City of Chicago like any other city has its good neighborhoods and bad neighborhoods. Many of you may be familiar on different degrees with the bad neighborhoods. For those of you who are not, you've gotten a close-up view of

one of the bad neighborhoods in Chicago in the 3700 block of West Arlington.

This is a bad neighborhood because there are bad people there. At around 1:00 in the morning you heard how there are felons that hang out there out in the courtyard playing dice, and there are people like [defendant] with his two cohorts, McGray (*sic*) and Ferguson.

The kind of person [defendant] is, *** whereupon the slightest perception of an insult he goes with his two cohorts, comes back each with guns, riddled the victim John Kennedy with bullets because of his perceived insult. That's the kind of person [defendant] is, and that's the kind of people that are out there in this bad neighborhood."

¶ 99 However, the prosecution then stated that this was "not a neighborhood that's only full of bad people. There are good people here like Latasha Watson *** not every single person here is a bad person." The State continued:

"[I]t's a bad neighborhood because there are bad people doing bad things. However, that night [the victim] actually did something decent, something honorable, something he didn't have to do. A kid, Tobias, was getting into an argument with three bigger adults, [defendant], McCray and Ferguson. John Kennedy, the victim, stood up for the kid. Stood for a kid he didn't have to do this [for]. He said why are bothering that kid. For a moment there is such an awful, terrible, scary neighborhood an act of decency was done by [the victim]. What happens when he does this? What is his price that he pays for being a decent

human being at that moment? He gets cold bloodily shot and murdered by [defendant] and his cohorts."

¶ 100 The State then ended its closing argument by stating that what defendant did "deserves justice," and that:

"[t]his neighborhood and all those people that live there give them a ray of hope by declaring the truth with your verdicts and giving justice to that area by signing the verdict forms of guilty and that he personally discharged the firearm because that is the truth, and that is what justice and law requires."

¶ 101 Finally, in rebuttal argument, the prosecutor stated:

"We have proven our case beyond a reasonable doubt. We are asking that you give justice not only to John Kennedy but to every person living in a neighborhood in the city of Chicago where people are scared to talk to the police. They have every right to drink beers and hang out in the front of the courtyard as any person does on their wrap around porch in Winnetka sipping Mint Juleps or someone in Beverly having a beer sitting on their front porch.

***

Everybody has a right to be safe in their home. It doesn't matter who you are, if you're a convicted felon or the kind of person who stands out at 1:30 in the morning shooting dice or if you are the mayor of the city. Everyone on that block deserves justice."

¶ 102 Defendant contends that these comments made by the State in closing arguments

constitute an improper "us-versus-them" argument. As we stated above, prosecutors are given a wide latitude in closing arguments. *Blue*, 189 Ill. 2d at 127. In closing, the prosecutor may comment on the evidence and any fair, reasonable inferences it yields, even if such inferences reflect negatively on the defendant. *Pasch*, 152 Ill. 2d at 184. When reviewing a challenge to remarks made by the prosecution during closing argument, the comments must be considered in context of the entire closing arguments made by both parties. *Wiley*, 165 Ill. 2d 259.

¶ 103 Closing arguments must serve a purpose beyond inflaming the emotions of the jury. *People v. Wheeler*, 226 Ill. 2d 92, 128 (2007). "A prosecutor cannot use closing argument simply to 'inflame the passions or develop the prejudices of the jury without throwing any light upon the issues.' " *Wheeler*, 226 Ill. 2d at 128-29 (quoting *People v. Halteman*, 10 Ill. 2d 74, 84 (1956). It is improper for a prosecutor to forge an "us-versus-them" mentality that is inconsistent with the criminal trial principle that a jury fulfills a non-partisan role. *Id*. at 129. However, a reviewing court will not reverse a jury's verdict based upon improper remarks made during closing arguments unless the comments were of such magnitude that they resulted in substantial prejudice to defendant and constituted a material factor in his conviction. *Griffin*, 368 Ill. App. 3d at 376.

¶ 104 In *Wheeler*, the prosecutor made improper comments in closing argument. He stated that he was the lone and solitary figure left to champion the deceased, while bearing the burden of avenging another's death. Later he proposed that he was outnumbered by the defense attorneys who were not interested in presenting the jury with accurate information but only wanted to prove the police witnesses as liars. The prosecutor made a mock call to 9-1-1 as part of his

closing argument and suggested that if the jurors felt that police reports had to precisely corroborate police testimony at trial, police officers will no longer be able to effectively respond to emergencies, and the jurors might compromise their own safety in the future. The prosecutor also told the jurors that they lived sheltered lives but that other worlds existed full of dangerous people. He stated that the police efficiency and expedience were more important than accuracy and urged the jurors to consider their own safety in deliberation, rather than deliberating on the guilt or innocence of the defendant. *Wheeler*, 226 Ill. 2d at 129-31.

¶ 105 Unlike in *Wheeler*, we find that it was not the prosecutor's chief goal in this case to inflame the passions and prejudices of the jury, uniting the interests of the jurors in their own safety with that of the interests of the state in convicting defendant. While the prosecutor did identify the neighborhood in which the incident occurred as a bad neighborhood, and did remark that the jurors would do justice by finding defendant guilty, those statements were isolated remarks in his closing argument as a whole. Furthermore, his reasons for calling the neighborhood a bad neighborhood was based on the evidence. From the evidence presented, or reasonable inferences therefrom, it was shown that there were in fact convicted felons playing dice together late at night, and that there was a fight that resulted in a shooting. Accordingly, the remarks were proper.

¶ 106 However, even if we were to find that the remarks were improper, we find that the jury could not have reached a contrary verdict had the improper remarks not been made, nor could we say that the improper remarks contributed to the defendant's conviction. *Wheeler*, 226 Ill. 2d at 123. Accordingly, a new trial need not be granted. *Id.*

¶ 107 D. Disparity between Sentences

¶ 108 Defendant and McCray were tried separately, and were both found guilty of first-degree murder of the victim. McCray was sentenced to 32 years for murder, while defendant was sentenced to 45 years in prison. The same trial judge presided over both cases, and noted the disparity during sentencing, but stated that the longer sentence was due to defendant's background and his factual participation in the crime. On appeal, defendant contends that neither of those factors justified the substantial disparity between the sentences because the evidence at trial did not indicate that defendant's participation in the offense was more culpable than McCray's, and defendant had an "identical" criminal history as McCray.

¶ 109 A trial court's sentencing decisions are entitled to great deference and weight. *People v. Streit*, 142 Ill. 2d 13, 18 (1991). A trial judge is in a better position than an appellate court to fashion an appropriate sentence, because the judge can make a reasoned judgment based upon firsthand consideration of such factors as " 'the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age' "; whereas the appellate court has to rely entirely on the record. *Streit*, 142 Ill. 2d at 19 (quoting *People v. Perruquett*, 68 Ill. 2d 149, 154 (1977)).

¶ 110 Generally, similarly situated defendants should not receive grossly disparate sentences. *People v. Tate*, 122 Ill. App. 3d 660, 668 (1984). However, fundamental fairness is not violated simply because one defendant is sentenced to a greater term than another. *People v. McCann*, 348 Ill. App. 3d 328, 339 (2004). "A disparity in sentencing may be justified by differences in the relative degree of involvement by the codefendants in the offense, or any differences in their

criminal histories, character or potential for rehabilitation." *McCann*, 348 Ill. App. 3d at 339; *People v. Grisset*, 288 Ill. App. 3d 620 (1997).

¶ 111 Here, the trial court specifically noted at the sentencing hearing that defendant felt he was disrespected, and that he endangered his whole community on the night in question by bringing a handgun to the scene. It could be inferred from the evidence that defendant was more culpable than McCray because there were more bullets found in the victim's body from a 9mm gun than from a rifle.

¶ 112 Additionally, defendant's presentencing investigation shows that he had three findings of delinquency as a minor, and five felony convictions as an adult. One of the felony convictions was for aggravated unlawful use of a weapon, and the other four were for narcotics offenses. Additionally, defendant was twice caught with a sharp metal object in his cell during the pendency of his trial. While McCray had four felony convictions, there is no evidence in the record suggesting that McCray had any pending charges against him for offenses he committed in jail. Accordingly, the criminal records of the two were different and thus it was in the trial court's discretion to sentence defendant differently than McCray.

¶ 113 Moreover, the sentence imposed by the trial court fell within the sentencing parameters for the crime committed by defendant. See *People v. Thurmond*, 317 Ill. App. 3d 1133, 1142 (2000) (defendant's sentence is within the appropriate range, and is therefore presumably proper). The sentencing range for murder is between 20 and 60 years. 730 ILCS 5/5-8-1(a)(1)(a) (West 2008). If during the commission of the offense, the offender discharges a firearm that "proximately caused great bodily harm, permanent disability, permanent disfigurement, or death"

to another, the trial court is required to add 25 years to a natural life term to that sentence. 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2008). Defendant was sentenced to 65 years for murder and for personally discharging a firearm that resulted in the death of the victim, which was in the appropriate range, and was therefore presumably proper. See *Thurmond*, 317 Ill. App. 3d at 1142.

¶ 114 E. Mittimus

¶ 115 After the jury's general verdict, the trial court entered a judgment of guilty on four counts of first-degree murder. Although the court announced that all of the counts merged into the first count, defendant's mittimus improperly reflects convictions for four counts of murder. Because there was only one victim, both parties agree that the mittimus should reflect a conviction for only one count of first-degree murder.

¶ 116 Remand is unnecessary since we have the authority pursuant to Supreme Court Rule 615(b)(1) to directly order the clerk of the circuit court to make the necessary corrections to defendant's mittimus. *People v. McCray*, 273 Ill. App. 3d 396, 403 (1995). Accordingly, we order that defendant's mittimus be corrected to reflect only one conviction for first-degree murder.

¶ 117 III. CONCLUSION

¶ 118 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County, and order the mittimus to be corrected.

¶ 119 Affirmed. Mittimus corrected.