FIRST DIVISION
August 26, 2013

No. 1-10-3358

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. 06 CR 27308
	)	
BRIAN GOOLSBY,	)	Honorable
	)	Arthur F. Hill, Jr.,
Defendant-Appellant.	)	Judge Presiding.

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

O R D E R

¶ 1 ***HELD:*** On appeal from defendant's conviction for first degree murder, we find: (1) defendant was proven guilty beyond a reasonable doubt; (2) a number of prior inconsistent statements made by the State's witnesses were properly considered as both substantive evidence and for purposes of impeachment; (3) the State did not make any improper or prejudicial remarks during closing arguments; (4) defendant did not receive ineffective assistance of counsel; (5) defendant's 85-year prison sentence is not excessive, nor did it result from any procedural error; and (6) defendant is entitled to additional credit for time spent in presentence custody.

¶ 2 After a jury trial, defendant-appellant, Brian Goolsby, was convicted of first degree murder and sentenced to 85 years' imprisonment. On appeal, defendant contends: (1) he was not proven

guilty beyond a reasonable doubt; (2) a number of prior inconsistent statements made by the State's witnesses were, in part or in whole, improperly admitted as both substantive evidence and for purposes of impeachment; (3) the State made improper and prejudicial remarks during closing arguments; (4) he received ineffective assistance of counsel; (5) his 85-year prison sentence is both excessive and the result of the trial court's use of an improper procedure; and (6) he is entitled to additional credit for time spent in presentence custody. While we grant defendant additional presentence custody credit, we otherwise affirm his conviction and sentence.

¶ 3 I. BACKGROUND

¶ 4 Defendant was charged by indictment with six counts of first degree murder. Each count of the indictment generally alleged that, on or about October 6, 2005, defendant shot and killed Terrell Davis.[1]

¶ 5 Before trial, the State filed two motions which indicated that it intended to introduce evidence of other crimes against defendant and which also sought a pretrial ruling allowing the introduction of such evidence. The other-crimes evidence would include information about two instances, occurring in the days before Mr. Davis's death, in which Mr. Davis insulted defendant after defendant was involved in fights with two other men. The evidence would also include instances in which defendant, thereafter, threatened Mr. Davis. The State argued that this evidence should be admitted to show defendant's intent and motive. The trial court granted the State's motions, and the matter proceeded to a jury trial in May of 2008.

[1] The indictment also included other counts charging defendant with being an armed habitual criminal and with unlawful use of a weapon by a felon. However, these counts were severed for purposes of trial and the State subsequently elected to *nolle prosequi* them.

¶ 6 Antoinette Brayboy testified that she was Mr. Davis's sister, and that on the date of his death, October 6, 2005, she lived in a house on the 6200 block of South Maplewood Avenue in Chicago. Ms. Brayboy lived there with Mr. Davis, her mother and grandmother, and her other brothers and sisters. Mr. Davis was 17 years old at the time.

¶ 7 Around 1 a.m. on that day, Mr. Davis left the house after receiving a phone call. At that time, only Ms. Brayboy, her grandmother, and her aunt were left in the house. Approximately one hour later, Ms. Brayboy's grandmother indicated that she had heard gunshots. Ms. Brayboy waited by the front door for 20 to 30 minutes for Mr. Davis to return, but he had not arrived by the time Ms. Brayboy's mother returned from a friend's house. Approximately 30 to 40 minutes after her grandmother had first heard the gunshots, Ms. Brayboy and her mother left the house to walk toward the intersection of Campbell Avenue (the street immediately east of Maplewood Avenue) and 63rd Street, where Ms. Brayboy's mother indicated there was "something going on."

¶ 8 While *en route*, Ms. Brayboy observed a man she knew as "Lucky" walk toward a car parked on Maplewood Avenue. Defendant was sitting in the passenger seat of that car, and both Lucky and defendant looked at Ms. Brayboy and her mother as they were driving away. Before Ms. Brayboy and her mother reached Campbell Avenue and 63rd Street, someone on the street told Ms. Brayboy that he was sorry because "that's your brother."

¶ 9 The parties stipulated that Ms. Brayboy would identify Mr. Davis in a photo of his body. Ms. Brayboy also testified that she identified both defendant and Lucky in photos presented to her when

she was interviewed by Detective Sampin[2] in the days after the shooting, and that she did not recall being interviewed by Detective Wright. Ms. Brayboy also denied ever telling Detective Wright that it was her aunt that heard the gunshots and that she ran out of the house immediately thereafter.

¶ 10 Johnny Hardin testified that he was acquainted with both defendant and Mr. Davis as they had all lived in the same neighborhood. He was also very familiar with the area around the intersection of Campbell Avenue and 63rd Street, as he had sold drugs there. Indeed, Mr. Hardin testified that he had four prior felony convictions for possession of a controlled substance. While Mr. Hardin had provided prior statements about witnessing defendant shoot Mr. Davis to a Cook County Assistant State's Attorney (ASA) and to the grand jury, at trial he recanted those prior statements.

¶ 11 Specifically, at trial Mr. Hardin testified that in October of 2005, he was living with his sister on the 6900 block of South Indiana Avenue and not at his grandmother's house where he used to reside. His grandmother lived on the 6200 block of South Artesian Avenue. Mr. Hardin had recently been released from boot camp following one of his prior felony convictions, and had been placed on electronic monitoring at his sister's house. If Mr. Hardin traveled over 100 feet from that location, an alarm would be sent to the sheriff's office. As such, Mr. Hardin testified that he did not leave his sister's house on October 5 or 6 of 2005, and did not actually witness defendant shoot Mr. Davis.

¶ 12 Instead, Mr. Hardin testified that on July 23, 2006, he was driving his two children to school

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[2] The report of proceedings contains numerous different spellings of this individual's last name, but it is evident from the record that the correct spelling is "Sampin."

when he was stopped by Chicago police officers. A gun, which defendant testified he had for "protection," was found in Mr. Hardin's car. Mr. Hardin was handcuffed, and both he and his children were then taken to a nearby police station. There, Mr. Hardin was questioned about Mr. Davis's murder over the course of many hours, with the questioning continuing into the next day. Detective Sampin took part in that questioning.

¶ 13 Mr. Hardin explained that he, Detective Sampin, and the other the police officers came to an "arrangement" after he was threatened with arrest for possession of the gun and with having his children taken into custody by the Illinois Department of Children and Family Services (DCFS). Pursuant to that arrangement, Mr. Hardin would not be charged, and his children would not be taken into custody if Mr. Hardin gave a statement to an ASA about defendant's involvement in Mr. Davis's death. In essence, and after going over a proposed statement for many hours, Mr. Hardin would tell the ASA "what [he] was supposed to tell them."

¶ 14 Thus, while he testified that none of it was true, Mr. Hardin admitted at trial that he gave a statement to ASA Katherine Malloy implicating defendant in Mr. Davis's death. Specifically, in his prior statement, Mr. Hardin had indicated that on the evening of October 5, 2005, he went to his girlfriend's house. She lived near the intersection of Campbell Avenue and 63rd Street, and Mr. Hardin was walking up to that intersection after he left his girlfriend's house around 2 a.m. on October 6, 2005. Mr. Hardin heard a gunshot as he was approaching that intersection, but he kept walking as the gunshot was not too loud.

¶ 15 When Mr. Hardin arrived at the southwest corner of Campbell Avenue and 63rd Street, he saw Mr. Davis running north toward 62nd Street through a vacant lot on the opposite corner. Some

10 to 15 seconds later, Mr. Hardin observed defendant chasing Mr. Davis. After Mr. Davis fell at the edge of the vacant lot, defendant caught up with him and shot Mr. Davis two or three times with a chrome gun. Mr. Davis did not appear to have a weapon. Mr. Hardin then observed defendant run back through the lot and throw his gun onto the roof of a building which contained a Dollar Store on the ground floor, and apartments above. Mr. Hardin did not know if there was anyone else in the lot, but he did not see anyone else. Mr. Hardin did see defendant's face illuminated by the streetlights, and he confirmed that it was Mr. Davis on the ground when he walked past him on his way home after the shooting.

¶ 16 At trial, Mr. Hardin acknowledged that ASA Malloy drafted a handwritten statement based upon what he had told her. Mr. Hardin also confirmed that he had made corrections to that handwritten statement, and had signed each page after going over the document with ASA Malloy confirming that its contents were true and correct. Mr. Hardin also told her that the police had not made any threats or promises in exchange for the statement, he had been treated well by the police, he had never been handcuffed, and he had given the statement freely and voluntarily. Mr. Hardin did not tell ASA Malloy anything about the "arrangement" he had made with Detective Sampin and the other police officers.

¶ 17 Mr. Hardin also acknowledged that he had previously testified before the grand jury, and acknowledged providing testimony that essentially tracked the information contained in his handwritten statement. The only significant information contained in Mr. Hardin's grand jury testimony, but not contained in the prior statement, was: (1) defendant had used a silver automatic handgun in the shooting; and (2) Mr. Hardin did not tell anyone about the shooting because he was

on house arrest, and was not supposed to be out of his house at the time. He further testified at trial that, although he met with an ASA privately before his grand jury testimony, and while neither defendant nor the detectives were present during his grand jury testimony, Mr. Hardin never told the ASA or the grand jury about any police threats.

¶ 18 Nevertheless, at trial Mr. Hardin claimed that Detective Sampin had taken him to the grand jury, the two had gone over Mr. Hardin's prior statement, and Detective Sampin had instructed Mr. Hardin to testify consistently with the prior statement before the grand jury. Mr. Hardin, therefore, testified at trial that he lied in his prior grand jury testimony due to the "arrangement" he had made with the police.

¶ 19 Damion Dorsey, testified that he lived near the intersection of Campbell Avenue and 62nd Street in October of 2005. Damion knew both defendant and Mr. Davis well from growing up in that neighborhood, and testified that Mr. Davis was one of his best friends. Damion's older brother was named Delwin Dorsey.[3]

¶ 20 Sometime around October 1, 2005, Damion was returning from a party and was outside among a group of people that included defendant and Mr. Davis. After some others in the group got into a confrontation, defendant "blind side[d]" Damion by hitting him in the jaw. Damion did not fall to the ground or start bleeding, and Mr. Davis, thereafter, started "laughing, hooping and hollering" and told defendant that he was a "big pussy."

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[3] To avoid any confusion, both Damion Dorsey and his brother, Delwin Dorsey, will be referred to by their first names. And again, while the report of proceedings contains various spellings of Delwin Dorsey's first name, it is evident from the record that the correct spelling is "Delwin."

¶ 21 Around 2 a.m. on October 6, 2005, Damion was at home when he heard two gunshots. Seeing nothing when he looked out of his window, Damion used the restroom. After noticing some ambulance and police lights, Damion looked out the window a second time toward 63rd Street. He saw one of his cousins standing near an alley.

¶ 22 Damion went outside, and soon observed Mr. Davis lying on the ground. Sometime thereafter, he saw Mr. Davis's mother and sister walking toward him. Damion told them not to come any further, because the man on the ground was Mr. Davis. When Damion spoke to the police later that morning, he did not mention the prior incident involving defendant.

¶ 23 The next day, Damion was outside his house with a group of people that included his brother Delwin, when his brother received a phone call from defendant. After defendant hung up, he called again, and Delwin put the phone on "loud speaker." Defendant then said: "[Who] thought I was playing about whacking [Mr. Davis.] What I got to do, come through there and pop the sh*** out of one of y'all everyday." Defendant then hung up. At trial, Damion testified that he did not remember defendant saying the word "cracking," or the phrase "it's cracking." He testified that "if I tell somebody that's cracking, whenever I see them they better be prepared to fight or something happening to them."

¶ 24 Damion acknowledged that he was interviewed by the police, provided an ASA a handwritten statement, and testified before the grand jury. However, Damion did not remember defendant saying anything about the manner in which he killed Mr. Davis during the phone call, nor did he recall providing such testimony to the grand jury. Damion also testified that he only spoke with the police after Delwin asked him to, and that he told the police he had seen a black man walking past when

he looked out the window the second time on the night Mr. Davis was shot. That person was not defendant.

¶ 25 Mark Love testified that he had four prior felony convictions, and that he knew both defendant and Mr. Davis from living in the same neighborhood. One or two days before Mr. Davis was shot, Mr. Love had an altercation with defendant near the intersection of Campbell Avenue and 63nd Street. The two were intoxicated, and they exchanged a few punches near a group of people that included Mr. Davis.

¶ 26 At trial, Mr. Love testified that he told defendant he "hit like a bitch." Mr. Love then heard someone laughing, but he was not sure who that person was. Thereafter, defendant told Mr. Love specifically that it "was cracking" between the two, which Mr. Love testified could mean that there would be a fight or a shootout, depending on the circumstances or the neighborhood. However, Mr. Love said that–in his neighborhood–"cracking" would not mean a shootout, and he specifically denied that it was Mr. Davis who mocked defendant.

¶ 27 Mr. Love acknowledged that he had previously testified before the grand jury, where defendant, defense counsel, and the police were not present. At trial, Mr. Love equivocated as to whether he told the grand jury that it was Mr. Davis who mocked defendant during the altercation. At one point in his trial testimony, he denied telling the grand jury that it was Mr. Davis who told defendant he "hit like a bitch." However, at another point in his testimony, he admitted telling the grand jury that Mr. Davis did so because defendant was larger than Mr. Love. Additionally, while Mr. Love acknowledged telling the grand jury defendant told the group as a whole that it was "cracking," at trial he clarified defendant was actually only talking to Mr. Love himself.

¶ 28 Mr. Love further testified that when he saw Mr. Davis a day or two after the altercation at the location where Mr. Davis was later murdered, Mr. Davis did not seem upset or nervous. He also testified that he did not recall telling the grand jury that, at that time, he told Mr. Davis to go inside because "something strange" was going on, and defendant might come around and do "something stupid" due to the previous altercation.

¶ 29 Delwin Dorsey also had four prior felony convictions, and was serving a prison sentence for one of them at the time he testified at trial. Delwin testified that he had known both defendant and Mr. Davis for years, as they all lived in the same neighborhood. On October 5, 2005, Delwin had a conversation with defendant outside a store near the intersection of Campbell Avenue and 63rd Street. The two talked about the fact that "something had went [*sic*] on" between defendant and a group of people that included Mr. Davis and Mr. Love, and that it was "cracking" between defendant and that group. Delwin testified that "cracking" could have different meanings, including fighting or "[i]f someone like *** do something to you, you was talking about doing something back to them." Defendant asked Delwin how he felt about the situation, and Delwin told defendant that he was not choosing a side in the dispute because "[w]hatever they [had] going on, they had going on. All of us was cool." At trial, Delwin denied that he also observed defendant have a conversation with Mr. Davis at that time, or that during any such conversation defendant pointed a "chrome .380 handgun" at Mr. Davis and threatened to kill him.

¶ 30 Around 3 a.m. the following morning, Delwin received a call and was told that Mr. Davis was dead. Delwin went outside, and saw Mr. Davis's body lying on the ground on Campbell Street between 62nd and 63rd Streets. The following evening, Delwin was with a group of people that

included his brother, when Delwin's girlfriend received a call from defendant. Defendant was placed on speaker phone asked if anyone had a problem with him. After nobody responded, Delwin hung up the phone. Defendant called back and said that he had seen people talking to the police, and that it was "cracking." At trial, Delwin denied defendant also said that he had killed Mr. Davis and described the manner in which he done so.

¶ 31 Delwin testified that he met with Detective Sampin and ASA Nancy Galassini on July 3, 2006, but Delwin also testified that this only occurred after Detective Sampin picked him up off the street at gunpoint and took him to the police station in handcuffs. Delwin testified that he provided a statement to the detective and the ASA because he feared that he could be charged as an accessory to murder. While he admitted to signing a handwritten statement, Delwin testified that the ASA did not read him the statement before he signed it. He further denied that he told the ASA that he had personally observed defendant point a gun at Mr. Davis and threaten him. Delwin said that this was merely the "word on the street." He also denied telling the ASA defendant had admitted to killing Mr. Davis, and had described murder in detail when he called the day after the shooting.

¶ 32 Delwin admitted to testifying before the grand jury, and he further admitted that no promises where made to him in exchange for that testimony. He also admitted that, during his grand jury testimony, he identified the handwritten statement he had given to the ASA and indicated that no threats or promises were made to him in exchange for that statement. He also told the grand jury that he had been treated fairly by the police. Finally, Delwin admitted that when he spoke with defendant on the day before Mr. Davis was shot, defendant said he had told Mr. Davis "they sign they death certificate." However, Delwin denied that he had told the grand jury that he had actually witnessed

defendant threaten Mr. Davis with a gun or threaten to kill him. He also denied telling the grand jury defendant admitted to killing Mr. Davis, and had described the murder when he called the day after the shooting.

¶ 33 Detective Sayam Sampin testified about his involvement in the investigation of Mr. Davis's death. In October of 2005, Detective Sampin was searching for the gun used to shoot Mr. Davis on the rooftops of buildings near the intersection of Campbell Avenue and 63rd Street. While doing so, Detective Sampin was approached by a group of people that included Mr. Hardin and Delwin. Mr. Hardin told Detective Sampin that he was looking on the wrong roof. When Detective Sampin asked Mr. Hardin to direct him to the correct roof, Mr. Hardin walked away. Detective Sampin then asked Delwin if he would be willing to give a statement about the phone call he had received from defendant. Delwin declined to do so at the time, stating defendant had people watching "all the time," and that Delwin could get killed for giving a statement, or for simply being seen talking to Detective Sampin. No gun was ever recovered.

¶ 34 Detective Sampin also testified that he was ultimately able to interview Mr. Love, and Mr. Love said that he saw Mr. Davis laugh at a joke, and that defendant then said, "I'm gonna get you." In addition, Detective Sampin testified that both Delwin and Mr. Hardin also gave statements and testified before the grand jury. Detective Sampin testified that both Delwin and Mr. Hardin did so voluntarily, and that no threats or promises were made to either one in exchange for their statements or grand jury testimony. The detective specifically denied that he ever pointed a gun at or handcuffed Delwin, and further denied that Mr. Hardin was arrested before he gave his statement, or that Mr. Hardin was threatened with criminal charges or with the loss of his children.

¶ 35 ASA Nancy Glassini testified that she took a handwritten statement from Delwin in July of 2006, after being told by Detective Sampin that Delwin had information about the death of Mr. Davis. In the course of taking that statement, Delwin indicated that no threats or promises had been made to him and that he agreed to provide a statement voluntarily. Delwin was not in handcuffs at the time, and he never indicated that he was only providing a statement after being told to do so–at gunpoint–by Detective Sampin. After ASA Glassini completed the handwritten statement, Delwin was provided an opportunity to review it and make any corrections. Delwin then signed each page.

¶ 36 In the statement itself, Delwin indicated that he actually saw defendant point a "chrome .380 handgun" at Mr. Davis outside of "Frank's" store and threaten to kill him. He then saw Mr. Davis go back inside the store, and the store owner then told defendant to leave or the store's cameras would be turned on. Delwin also told ASA Glassini that, when defendant spoke with Delwin, he admitted killing Mr. Davis and described shooting Mr. Davis once, chasing him down and shooting him again and, finally, shooting Mr. Davis in the chest and chin as he lay on the ground.

¶ 37 Bradley Giglio testified that he was a former Cook County Assistant State's Attorney and, in that capacity, he had presented Damion, Delwin, and Mr. Hardin to the grand jury. Mr. Giglio indicated that–in general–witnesses were presented to the grand jury for numerous reasons, which included: (1) recording a particular witness's testimony; (2) obtaining a witness's testimony "in anticipation of that witness changing their story;" and (3) in response to a request made by the grand jurors themselves.

¶ 38 Mr. Giglio testified that Damion told the grand jury that he heard defendant admit to chasing Mr. Davis down, and to shooting Mr. Davis in the back and in the leg. Delwin testified before the

grand jury that, in an incident inside the store, defendant had threatened Mr. Davis with a "little gun," told him that it was "cracking," and that "y'all all signed your death certificate over to me." Delwin also testified that when defendant called following Mr. Davis's death, he admitted to killing Mr. Davis, and described how he had first shot Mr. Davis in the back of the leg. When Mr. Davis ran, defendant shot him again and Mr. Davis fell. Defendant then said he shot Mr. Davis once or twice more. Mr. Giglio testified that none of the three witnesses indicated that they had been mistreated by the police in any way, nor had they indicated that they had been promised or threatened with anything in exchange for their statements or testimony.

¶ 39 ASA Sabra Ebersole testified that she presented Mr. Love to the grand jury on November 29, 2006. She further testified that those proceedings were secret and, as such, neither defendant, defense counsel, nor any detectives were present during Mr. Love's grand jury testimony. In that testimony, Mr. Love said that it was Mr. Davis that told defendant he "hit like a bitch" after Mr. Love and defendant exchanged punches. Mr. Love also told the grand jury defendant, thereafter, told the entire group that it was "cracking," which meant that there would be a fight or a shootout, and that Mr. Love was afraid defendant was going to come back and "do something stupid." In addition, ASA Ebersole testified she did not threaten Mr. Love or make him any promises, and Mr. Love himself testified before the grand jury that no threats or promises and been made to him, and that he had been treated "[o]kay."

¶ 40 Dr. Nancy Jones testified that she performed an autopsy on Mr. Davis's body. She noted abrasions consistent with a fall, including abrasions on Mr. Davis's chin. She also noted separate gunshot wounds to Mr. Davis's right hand, left hip, right buttock, and chest, and three bullets were

recovered from the Mr. Davis's body. Dr. Jones opined that the cause of Mr. Davis's death was multiple gunshot wounds, and that the manner of death was homicide.

¶ 41 Forensic investigator, Mark Harvey, testified that he arrived at the murder scene shortly after 3 a.m. on October 6, 2005. At the scene, he and his partner photographed and recovered a fired bullet and a pair of gloves. Investigator Harvey also noted and photographed several spots of blood on the sidewalk leading up to Mr. Davis's body from the south. Investigator Harvey believed that the blood indicated that Mr. Davis was traveling north before he died. No bullet cartridge cases were recovered from the scene, but when asked if this fact led him to the conclusion that a revolver was used in the shooting, Investigator Harvey said it led him to "no conclusion."

¶ 42 The State and defendant then stipulated that the gloves recovered from the scene were analyzed, and no gunshot residue was detected. In addition, no latent fingerprints suitable for comparison were found on the gloves. With respect to the three bullets recovered from Mr. Davis's body and the fired bullet recovered from the scene, the parties stipulated that each bullet was "38/357 caliber," and each was fired from the same gun. Such bullets were typically used in revolvers, but could, in rare circumstances, be fired from a semi-automatic weapon. Without having the actual weapon used to fire the bullets for comparison, it was not possible to determine whether a revolver or a semi-automatic weapon fired these bullets. Semi-automatic weapons automatically eject cartridge cases as they are fired, while cartridge cases from revolvers must be removed from the weapon manually. It was further stipulated that a ".380" is a semi-automatic weapon that is not manufactured to fire a 38/357 caliber cartridge.

¶ 43 The State then elected to *nolle prosequi* all but counts 5 and 6 which alleged, respectively,

intentional or knowing murder, and that defendant shot and killed Mr. Davis knowing that such an act created a strong possibility of death or great bodily harm. The State rested its case, and the defense called two witnesses.

¶ 44 Detective Paulette Wright testified that she interviewed Ms. Brayboy on the street outside her house on October 6, 2005. Ms. Brayboy said that it was her "auntie" who heard the gunshots. Ms. Brayboy also told Detective Wright that she, thereafter, ran outside, although Detective Wright did not ask Ms. Brayboy when exactly she did so. Detective Michael Hughes testified that he was assigned to this matter on the night of Mr. Davis's death. After responding to the scene, Detective Hughes instructed forensic investigators to collect a pair of latex gloves on the street. In addition, Detective Hughes spoke to a number of people, including a Mr. Martin Lopez. When defense counsel attempted to ask Detective Hughes about what Mr. Lopez said, the trial court sustained the State's hearsay objections. After being questioned and admonished by the trial court about his choice, defendant elected not to testify at trial.

¶ 45 Following the presentation of closing arguments, the jury found defendant guilty of first degree murder. The jury also found defendant had, while armed with a firearm and during the commission of the murder, personally discharged a firearm that proximately caused death.

¶ 46 After defendant's trial counsel, an assistant public defender (APD) filed a motion for a new trial contending only that defendant had not been proven guilty beyond a reasonable doubt, a new defense attorney filed an appearance, and the APD was allowed to withdraw. Defendant's new attorney then filed two supplemental posttrial motions for a new trial. Defendant alleged in those motions that the APD had provided ineffective assistance of counsel by, *inter alia*, failing to

investigate and present various witnesses. Attached to the supplemental motions were affidavits from Mr. Kianta Britten and Ms. Tiana Williams. Each averred that they had not been interviewed by any attorney prior to trial, that each would have testified that they were present during the fight between defendant and Mr. Love, and that neither heard nor saw anyone laugh at defendant or tell him he hit like a "bitch."

¶ 47 The matter then proceeded to a hearing on the posttrial motions, at which both defendant and the APD testified. Among other things, defendant testified that he only had a handful of conversations with the APD prior to trial. In those conversations, defendant told the APD that he was not present when Mr. Davis was shot and told him where he was. Defendant did not provide any additional information about his whereabouts at the time of the murder, but he did testify that he gave the APD the names of four potential alibi witnesses: Mr. John Elmore; Ms. Paris Henderson; Ms. Donna Henderson; and Ms. Bonita Jackson.[4] Defendant testified that, in response, the APD said "he don't do alibi defenses."

¶ 48 Defendant also testified that he provided the APD with the names of three witnesses who could rebut the State's evidence regarding his fight with Mr. Love: Mr. Britten; Ms. Williams; and Bernard Cook. However, the APD never interviewed Mr. Britten or Mr. Cook at all, and only interviewed Ms. Williams for a very brief amount of time during trial before deciding not to present her as a witness.

¶ 49 Defendant testified that he and the APD had also discussed another potential witness, Mr.

[4] In the record on appeal, Ms. Paris Henderson's first name is alternately stated to be Paris, Parish, and Patricia. Because there is no definitive indication as to what her first name actually is, we identify her as she was first referred to by defendant–Ms. Paris Henderson.

Lopez. Defendant testified that he and Mr. Lopez knew each other, as Mr. Lopez worked at a sandwich shop located across the street from where Mr. Davis was shot, and defendant was a frequent customer there. As defendant understood from his conversations with the APD and the discovery tendered by the State, Mr. Lopez had told the police that he was working at the sandwich shop on the night Mr. Davis was shot. After Mr. Lopez heard three or four gunshots, he looked outside and saw three black males running away from the scene and get into a car. According to defendant, Mr. Lopez also told the police that he could identify those three individuals if they were shown to him. Indeed, defendant testified that the APD told him that "Martin Lopez, in fact, did say that he didn't identify me as [being] one of the persons on a crime." Defendant did acknowledge that the APD did discuss with him the fact that Mr. Lopez had never been confronted with defendant's image, "either in picture or in person."

¶ 50 Finally, while defendant testified that he always wanted to testify and present his alibi defense, he did acknowledge that he told the trial court that he did not want to testify, and that this decision represented his free and voluntary decision.

¶ 51 The APD testified that he had been an attorney for 23 years, an APD for 21 years, and assigned to the homicide task force of the Public Defender's office for the past 7 years. The APD further testified that, in their pretrial conversations, defendant only gave him the names of two potential alibi witnesses–Mr. John Elmore and Ms. Paris Henderson. The APD did admit that he subsequently learned about Ms. Donna Henderson from defendant's family. He also acknowledged that he did not interview any potential alibi witnesses, and that he told defendant about his personal philosophy against presenting alibi defenses.

¶ 52 Nevertheless, the APD testified that, in regard to a potential alibi, he had reviewed the content of Mr. Elmore's and Ms. Paris Henderson's prior statements and grand jury testimony. Ms. Paris Henderson had indicated that, while she was with defendant on the night of the murder, defendant left at some point and she could not actually remember when he did so, or when he returned. Based upon those facts, the APD concluded that Ms. Paris Henderson "would make a very poor alibi witness." Additionally, Mr. Elmore had indicated that he was drunk on the night of the murder. The APD testified that this fact weighed on his consideration of the viability of Mr. Elmore to support an alibi defense. While the APD still tried to contact Mr. Elmore, neither he nor his investigators were successful in doing so.

¶ 53 The APD admitted defendant gave him the name of Mr. Britten as a potential witness to the fight with Mr. Love, and the APD was aware of the contents of Mr. Britten's potential testimony. While the APD also admitted that he did not interview Mr. Britten or call him as a witness on behalf of the defendant, the APD explained that one of the factors he considered was that he did not want to add to the list of people who were present at defendant's fight with Mr. Love. With respect to Ms. Williams, the APD admitted that he only interviewed her very briefly at trial before deciding not to call her as a witness. The APD had concluded her information "was not helpful to bolster Mr. Goolsby's defense" and could, in fact, have been detrimental.

¶ 54 The APD acknowledged that he counseled defendant not to testify, and he admitted that he did unsuccessfully attempt to introduce the statements of Mr. Lopez at trial–through the testimony of Detective Hughes–in an effort to impeach Mr. Hardin's testimony about what occurred when Mr. Davis was shot.

¶ 55 The trial court denied defendant's motions for a new trial. In doing so, the trial court indicated that it had judged the credibility of defendant and the APD, and specifically found defendant freely and voluntarily chose not to testify. While the trial court did find the APD's position on alibi defenses "curious," it further concluded defendant had not been prejudiced with respect to any possible alibi defense. With regard to the other issues raised by defendant, the trial court concluded both that the APD's performance was not unreasonable, and defendant was not prejudiced by any of the APD's decisions.

¶ 56 The trial court also denied defendant's motion to reconsider the denial of his posttrial motions. In doing so, that trial court again noted that it had judged the credibility of defendant and the APD and had "credibility questions" with respect to some of defendant's testimony. The trial court also reiterated that, while it did take issue with the APD's position on alibi defenses, defendant had not established any prejudice with respect to any of the issues he raised regarding the APD's performance.

¶ 57 After evidence and arguments in aggravation and mitigation were presented at defendant's subsequent sentencing hearing, the trial court merged the guilty verdicts on counts 5 and 6, and sentenced defendant to a term of 85 years' imprisonment for a conviction under count 5. This sentence was comprised of a maximum sentence of 60 years' imprisonment for first degree murder, plus an additional 25 years' imprisonment because defendant had been found guilty of personally discharging a firearm during the commission of the murder. Defendant's motion to reconsider his sentence was denied, and he has now appealed.

¶ 58 II. ANALYSIS

¶ 59 As noted above, defendant raises a number of arguments on appeal. We address each argument in turn.

¶ 60 A. Sufficiency of the Evidence

¶ 61 We first address defendant's challenge to the sufficiency of the evidence supporting his conviction.

¶ 62 When presented with such a challenge, it is not the function of this court to retry defendant; rather, we review the evidence in the light most favorable to the State to determine whether any rational trier of fact could have found the elements of the crime proven beyond a reasonable doubt. *People v. Evans*, 209 Ill. 2d 194, 209 (2004); *People v. Collins*, 106 Ill. 2d 237 (1985). The trier of fact's findings are entitled to great weight, given that it is in the best position to judge the credibility and demeanor of the witnesses. *People v. Wheeler*, 226 Ill. 2d 92, 114-15 (2007). As such, a reviewing court will not substitute its judgment for that of a trier of fact on issues involving the weight of evidence or the credibility of witnesses. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009). A reversal is warranted only if the evidence is so improbable or unsatisfactory, it leaves a reasonable doubt regarding the defendant's guilt. *Evans*, 209 Ill. 2d at 209.

¶ 63 Defendant was convicted of first degree murder under count 5, which alleged that "he, without lawful justification, intentionally or knowingly shot and killed Terrell Davis while armed with a firearm, and during the commission of the offense he personally discharged a firearm that proximately caused death." These allegations track the relevant statutory language defining the offense of first degree murder and providing for a sentencing enhancement due to defendant's use of a firearm. See 720 ILCS 5/9-1(a)(1) (West 2004) ("[a] person who kills an individual without

lawful justification commits first degree murder if, in performing the acts which cause the death *** he either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another"); 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2004) ("if, during the commission of the offense, the person personally discharged a firearm that proximately caused great bodily harm, permanent disability, permanent disfigurement, or death to another person, 25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court").

¶ 64 In challenging the sufficiency of the evidence, defendant first contends that his conviction cannot stand because it is based, in significant part, upon the prior inconsistent statements of witnesses who recanted all or part of those prior statements at trial. However, "this court has held that there are no 'suspect categories' of properly admitted evidence ***." *People v. Craig*, 334 Ill. App. 3d 426, 439 (2002) (quoting *People v. Curtis*, 296 Ill. App. 3d 991, 999 (1998)). As such, "[a] conviction, supported by a substantively admitted prior inconsistent statement, may be upheld even though a witness recants on the stand the prior inconsistent statement ***." *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 23. As many cases have previously recognized, substantively admitted previous inconsistent statements are *alone* sufficient to prove a defendant's guilt beyond a reasonable doubt. *People v. Armstrong*, 2013 IL App (3d) 110388, ¶¶ 23-25; *Craig*, 334 Ill. App. 3d at 438; *People v. Morrow*, 303 Ill. App. 3d 671, 677 (1999).

¶ 65 We similarly reject defendant's contention that his conviction must be overturned because the prior inconsistent statements were not corroborated by physical or other evidence. "[W]here a jury or trial court has convicted a defendant on the basis of a recanted prior inconsistent statement,

the question for the reviewing court is not whether any evidence existed to corroborate that statement. [Citation.] Rather, the only inquiry is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *People v. Zizzo*, 301 Ill. App. 3d 481, 489 (1998) (citing *Curtis*, 296 Ill. App. 3d at 999); *Armstrong*, 2013 IL App (3d) 110388, ¶¶ 26 (same). Thus, it is well recognized that "recanted prior inconsistent statements can be sufficient to support a conviction, even without corroborating evidence." *People v. Thomas*, 354 Ill. App. 3d 868, 878 (2004) (collecting cases).

¶ 66 Nor do we agree with defendant's contention that the prior statements of the State's witnesses were significantly contradicted by the physical evidence presented at trial. Defendant first notes that, in his grand jury testimony, Mr. Hardin indicated defendant shot Mr. Davis with a silver automatic weapon. He also notes that Delwin alleged in his handwritten statement that defendant had threatened Mr. Davis with a chrome ".380" handgun, which was stipulated to be a type of semi-automatic weapon. Defendant contends that the physical evidence established that Mr. Davis was actually shot with a revolver, significantly undercutting the credibility of these statements.

¶ 67 First, defendant overstates the conclusiveness of the physical evidence. While it was stipulated that the recovered bullets were of a type most typically used in revolvers and could not have been fired from a .380 gun, it was also acknowledged that the bullets could have been fired from some other type of semi-automatic weapon. It was also stipulated that without having the actual weapon used to fire the bullets for comparison, it was impossible to determine exactly what type of weapon fired these bullets. Furthermore, while semi-automatic weapons automatically eject

cartridge cases and no cartridges were located at the crime scene, Investigator Harvey specifically testified that the absence of cartridges led him to "no conclusion" that the weapon used in the murder was a revolver. Viewing the evidence in the light most favorable to the State, the physical evidence did not establish that a revolver was used to murder Mr. Davis, such that the prior statements of Mr. Hardin and Delwin were seriously called into question.

¶ 68 Moreover, even if–as the State itself acknowledged in closing arguments–there was some possible inconsistency between the prior statements and the physical evidence on this point, we reiterate that "[t]he weight to be given the witnesses' testimony, the credibility of the witnesses, resolution of inconsistencies and conflicts in the evidence, and reasonable inferences to be drawn from the testimony are the responsibility of the trier of fact." *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). Furthermore, inconsistencies that are minor in nature, and fully explored at trial, do not create a reasonable doubt of defendant's guilt. *People v. Brown*, 388 Ill. App. 3d 104, 109 (2009). Here, the type of gun used was collateral to the offense, and any inconsistency in the evidence on this point was fully addressed at trial. We, therefore, do not find any possible inconsistency on this point–in light of all the evidence–to be so serious that it leaves a reasonable doubt regarding the defendant's guilt. *Evans*, 209 Ill. 2d at 209. Other courts have come to a similar conclusion in situations where there was inconsistent evidence regarding the description of the gun used during an offense. *People v. Leak*, 398 Ill. App. 3d 798, 818 (2010); *In Interest of Gonzalez*, 95 Ill. App. 3d 750, 754-55 (1981); *People v. Adkins*, 29 Ill. 2d 332, 335-36 (1963).

¶ 69 Defendant also notes that, in their prior statements, Delwin and Damion indicated defendant admitted to shooting Mr. Davis in the leg, and Delwin said defendant admitted to shooting Mr. Davis

in the chin. Defendant contends that these prior statements are significantly contradicted by the physical evidence, because Mr. Davis's autopsy did not reflect gunshot wounds to his leg and chin. We reject defendant's argument on this point.

¶ 70 First, Mr. Davis's autopsy showed that he had a gunshot wound to his left hip. It is entirely possible defendant was referring to this wound when he generally described to Damion and Delwin how he had shot Mr. Davis in the "leg." Second, while Mr. Davis was not shot in the chin, Mr. Davis did suffer an abrasion there. Photos of Mr. Davis's body from the crime scene show a significant amount of trauma and blood on Mr. Davis's chin and face. It may well have been defendant himself that was mistaken about how the injury to Mr. Davis's chin occurred. In any case, " 'discrepancies in testimony *** do not necessarily destroy the credibility of a witness, but go only to the weight to be afforded his testimony.' " *People v. Garcia*, 2012 IL App (1st) 103590, ¶ 85 (quoting *People v. Ranola*, 153 Ill. App. 3d 92, 98 (1987)). Here, the primary import of Damion and Delwin's prior statements is that defendant admitted to chasing Mr. Davis down and shooting him multiple times. Those statements were significantly corroborated by the physical evidence.

¶ 71 Ultimately, the State presented evidence–in the form of the prior statements and testimony–that defendant was observed threatening to kill Mr. Davis, and then observed actually doing so by shooting him multiple times with a gun. He was later heard to admit to killing Mr. Davis, and to describing his actions in a manner that largely corresponded to the description provided by Mr. Hardin in his prior statements and to the physical evidence. While portions of the prior statements were disavowed at trial by the State's witnesses, it was for that jury to weigh the prior statements, weigh the disavowals, and determine which was to be believed. *People v. Williams*, 332

Ill. App. 3d 693, 696-97 (2002); *People v. Arcos*, 282 Ill. App. 3d 870, 875 (1996). Viewing it in the light most favorable to the State, we cannot say that the evidence was so improbable or unsatisfactory that there is a reasonable doubt regarding the jury's conclusion that defendant was guilty. *Evans*, 209 Ill. 2d at 209.

¶ 72 B. Evidentiary Issues

¶ 73 Defendant next raises several challenges to the admission into evidence of the prior inconsistent statements of both Mr. Hardin and Delwin. As defendant and the State both acknowledge, however, defendant did not properly preserve these arguments by including them in his posttrial motions. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (to preserve a claim for review, a defendant must both object at trial and include the alleged error in a written posttrial motion). Nevertheless, we will address defendant's arguments on appeal because any possible forfeiture is a limitation on the parties and not a limitation on the court. *People v. Demitro*, 406 Ill. App. 3d 954, 959 (2010). A trial court's decision concerning whether evidence is admissible will not be reversed absent a clear abuse of discretion. *People v. Morgan*, 197 Ill. 2d 404, 455-56 (2001).

¶ 74 The State introduced the prior inconsistent statements of Delwin and Mr. Hardin pursuant to section 115-10.1 of the Code of Criminal Procedure of 1963, which provides in relevant part:

> "In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if
>
> (a) the statement is inconsistent with his testimony at the hearing or trial, and
>
> (b) the witness is subject to cross-examination concerning the statement, and
>
> (c) the statement--

(1) was made under oath at a trial, hearing, or other proceeding, or

(2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and

(A) the statement is proved to have been written or signed by the witness, or

(B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding, or

(C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording." 725 ILCS 5/115-10.1 (West 2008).

"Under this provision, prior inconsistent statements are admissible as substantive evidence as long as the statutory requirements have been met." *People v. Bannister*, 378 Ill. App. 3d 19, 38 (2007). While section 115-10.1 further provides that "[n]othing in this Section shall render a prior inconsistent statement inadmissible for purposes of impeachment because such statement was not recorded or otherwise fails to meet the criteria set forth herein," (725 ILCS 115/10.1 (West 2008)) it has been recognized that "a party may only impeach its own witness through use of a prior inconsistent statement when the testimony of that witness does 'affirmative damage' to the party's case." *People v. Donegan*, 2012 IL App (1st) 102325, ¶ 36 (quoting *People v. Cruz*, 162 Ill. 2d 314, 361 (1994)).

¶ 75 Defendant first complains that the State was improperly allowed to introduce *both* the prior handwritten statements and the prior grand jury testimony of Delwin and Mr. Hardin. Defendant contends that, while the prior handwritten statements and the prior grand jury testimony of both Delwin and Mr. Hardin were inconsistent with their trial testimony, the prior statements and grand jury testimony of each witness were consistent with each other. Defendant, thus, contends that neither handwritten statement should have been admitted, in addition to the grand jury testimony, because this resulted in the improper admission of prior consistent statements which unfairly bolstered the credibility of each witnesses' account of the events surrounding Mr. Davis's death. See *People v. Terry*, 312 Ill. App. 3d 984, 995 (2000) (prior consistent statements are generally inadmissible, because they serve to unfairly enhance the credibility of the witness).

¶ 76 As defendant himself acknowledges, however, this very argument has been rejected by this court. *Donegan*, 2012 IL App (1st) 102325, ¶ 60 (citing *People v. Johnson*, 385 Ill. App. 3d 585, 608 (2008)); *People v. Maldonado*, 398 Ill. App. 3d 401, 423 (2010); *People v. Perry*, 2011 IL App (1st) 081228, ¶¶ 85-87; *People v. White*, 2011 IL App (1st) 092852, ¶¶ 51-53). Indeed, "[t]he consistency of statements is measured against a witness's trial testimony, not against each other; inconsistent statements are inconsistent with trial testimony; consistent statements are consistent with it. [Citation.] The rule against prior consistent statements exists because they needlessly bolster a witness's trial testimony, but inconsistent statements cannot bolster a witness's trial testimony and, thus, application of the rule makes no sense in this context." *Perry*, 2011 IL App (1st) 081228, ¶ 80. To the extent defendant also contends that the introduction of both the prior handwritten statements and the prior grand jury testimony of Delwin and Mr. Hardin was improperly

cumulative, that argument has also been recently rejected by this court. *People v. Wilson*, 2012 IL App (1st) 101038, ¶ 52.

¶ 77 Defendant has raised no arguments that were not raised in these previous cases. We, therefore, find that it was not improper for the trial court to admit the handwritten statements of Delwin and Mr. Hardin on the grounds that the statements represented prior consistent statements that were improperly cumulative of the witnesses' grand jury testimony.

¶ 78 Defendant also contends that a portion of Delwin's handwritten statement was not substantively admissible under section 115-10.1 because Delwin did not have personal knowledge of the underlying events; *i.e.*, Delwin did not actually witness the shooting defendant purportedly described in his phone call the day after Mr. Davis's death. Defendant also contends that Delwin's handwritten statement was not admissible for purposes of impeachment because Delwin's trial testimony did not affirmatively damage the State's case.

¶ 79 We need not further address these additional arguments on the merits. As defendant admits on appeal, Delwin's grand jury testimony was properly admitted as substantive evidence. Moreover, the record reflects that this grand jury testimony contained information virtually identical to that contained in Delwin's handwritten statement. As a number of cases have recognized, any possible error in the introduction of prior oral or handwritten statements–either substantively or for purposes of impeachment–is harmless under such circumstances. *Donegan*, 2012 IL App (1st) 102325, ¶¶ 37-38; *Wilson*, 2012 IL App (1st) 101038, ¶¶ 55-58; *People v. Modrowski*, 296 Ill. App. 3d 735, 747 (1998). Thus, the admission of Delwin's handwritten statement was at most harmless error and does not warrant reversal of defendant's conviction.

¶ 80 C. Closing Arguments

¶ 81 Next, we consider defendant's assertion that he was denied a fair trial due to improper comments and arguments made by the State in its closing arguments.

¶ 82 As an initial matter, defendant never objected to the comments and arguments he now challenges on appeal, nor did he include such a challenge in his posttrial motions. Therefore, defendant has not preserved this issue for appeal. *Enoch*, 122 Ill. 2d at 186. Defendant's forfeiture aside, we find his arguments unfounded.

¶ 83 A defendant "faces a substantial burden in attempting to achieve reversal of his conviction based upon improper remarks made during closing argument." *People v. Moore*, 358 Ill. App. 3d 683, 693 (2005). As this court has recognized:

> "A prosecutor is allowed wide latitude during closing arguments. [Citation.] A prosecutor may comment on the evidence presented at trial, as well as any fair, reasonable inferences therefrom, even if such inferences reflect negatively on the defendant. [Citation.] Remarks made during closing arguments must be examined in the context of those made by both the defense and the prosecution, and must always be based upon the evidence presented or reasonable inferences drawn therefrom." *People v. Willis*, 409 Ill. App. 3d 804, 813 (2011).

¶ 84 We also briefly note that in *Wheeler*, our supreme court reviewed the issue of allegedly improper prosecutorial statements during closing arguments *de novo*. *Wheeler*, 226 Ill. 2d at 121. In *People v. Blue*, 189 Ill. 2d 99 (2000), which was cited by *Wheeler*, our supreme court applied an abuse of discretion standard to this issue. *Id*. at 128. We need not resolve this conflict, as we find

no error in this case under either standard.

¶ 85 On appeal, defendant specifically objects to the following three comments and arguments made by the State during its closing arguments. First, he objects to the comment that "Delwin testified before the grand jury, again when he was in a safe and secret place." Second, he complains about the argument that "prior to coming into this courtroom, which is open to the public, [the State's witnesses] have the courage to go and tell the state's attorneys and the police and the grand jurors what they saw and heard." Third, defendant challenges the State's argument that "sometimes it's a little bit easier for people from the neighborhood who lived there at the time and still live there today, it's a little bit easier to go into the police quietly, one by one, and not in a public forum. And the law recognizes that maybe three years later when they have to come through those doors and pass by and stand here and identify the defendant in open court that they might not say the same thing they said before."

¶ 86 Defendant argues that these comments and arguments reflect the inflammatory and unsupported argument that the prior statements of the State's witnesses were credible because they were made in the "safe" and "secret" environment of a police station or grand jury room. The defendant contends that there was no evidence to support this inference, nor was there evidence to support the State's further inference that the witnesses changed their testimony at trial due to their fear of defendant.

¶ 87 We disagree. First, " '[t]he credibility of a witness is a proper subject for closing argument if it is based on the evidence or inferences drawn from it.' " *People v. Gorosteata*, 374 Ill. App. 3d 203, 223 (2007) (quoting *People v. Hudson*, 157 Ill. 2d 401, 445 (1993)). Furthermore, it has long

been recognized that "[w]here a witness has been shown to have made prior inconsistent statements, it is permissible for the jury to infer that the witness' [trial] testimony is a fabrication. Since this is a permissible inference, a suggestion that the jury adopt such an inference is within the proper bounds of closing argument." *People v. Cole*, 80 Ill. App. 3d 1105, 1107-08 (1980).

¶ 88 Here, there was abundant evidence that the State's witnesses had made prior inconsistent statements, and it was generally proper for the State to argue that the prior statements were more credible than the witnesses' trial testimony. Moreover, Damion, Mr. Hardin, and Mr. Love each testified that they were alone with the ASA and the grand jury, and evidence was presented that none of the State's witnesses were threatened or promised anything in exchange for their prior statements. Both ASA Ebersole and Mr. Giglio testified that the grand jury proceedings were secret, and Mr. Giglio testified that grand jury testimony is often secured in anticipation of a witness "changing their story."

¶ 89 Moreover, contrary to defendant's arguments on appeal, there was evidence to support an inference that the State's witnesses were afraid of defendant. Detective Sampin testified that Delwin stated that he was afraid to come forward with information because defendant had people watching and Delwin could get killed for talking to the police. Delwin himself testified at trial that, when defendant called the day after the murder, defendant specifically indicated that he had observed people talking to the police, asked the group listening if they had a problem with him, stated that it was still "cracking." Damion testified that, in that same conversation, defendant threatened that he might have to "come through there and pop the sh*** out of one of y'all everyday."

¶ 90 In light of this evidence, we conclude that the comments and arguments made by the State

during closing arguments were both proper and based upon the evidence presented at trial. Moreover, even if we were to find any of the State's comments and arguments improper, any possible prejudice was cured by the trial court's instructions to the jury. "[I]mproper arguments can be corrected by proper jury instructions, which carry more weight than the arguments of counsel. [Citations.] Moreover, any possible prejudicial impact is greatly diminished by the court's instructions that closing arguments are not evidence." *Willis*, 409 Ill. App. 3d at 814. Here, the trial court properly instructed the jury that arguments were not evidence and should not be considered as such. We, therefore, find that any possible error was cured by the admonishments provided by the trial court.

¶ 91 D. Ineffective Assistance of Counsel

¶ 92 Defendant next contends that he was provided ineffective assistance of counsel, in that the APD: (1) had an improper personal philosophy against alibi defenses; (2) failed to investigate and present various witnesses on defendant's behalf and improperly attempted to present evidence regarding the statements of Mr. Lopez via Detective Hughes; and (3) otherwise failed to mount a sufficient defense to the State's case.

¶ 93 A claim of ineffective assistance of counsel is judged according to the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). See *People v. Lawton*, 212 Ill. 2d 285, 302 (2004). In order to obtain relief under *Strickland*, a defendant must prove defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance caused defendant prejudice by creating a reasonable probability that, but for counsel's errors, the trial result would have been different. *People v. Wheeler*, 401 Ill. App. 3d 304, 313

(2010).

¶ 94 While the defendant must establish both prongs of this two-part test, a reviewing court need not address counsel's alleged deficiencies if the defendant fails to establish any prejudice. See *Strickland*, 466 U.S. at 687; *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). Defendant has the burden of establishing such prejudice. *People v. Glenn*, 363 Ill. App. 3d 170, 173 (2006). "In reviewing claims of ineffective assistance of counsel, we use a bifurcated standard of review, wherein we defer to the trial court's findings of fact unless they are against the manifest weight of the evidence, but make a *de novo* assessment of the ultimate legal issue of whether counsel's actions support an ineffective assistance claim." *People v. Nowicki*, 385 Ill. App. 3d 53, 81 (2008).

¶ 95 1. Alibi Defense

¶ 96 On appeal, defendant first faults the APD for having a personal philosophy against presenting alibi defenses and for failing to interview and present three potential alibi witnesses–Mr. Elmore, Ms. Paris Henderson, and Ms. Donna Henderson. As an initial matter, we note that while the APD later became aware of Ms. Donna Henderson, he testified defendant only provided him with the names of Mr. Elmore and Ms. Paris Henderson. The trial court generally found that it had questions about the credibility of defendant's testimony at the hearing on the posttrial motion. That issue aside, we find defendant's claim of ineffective assistance of counsel with respect to the APD's failure to interview and present a number of alibi witnesses is not supported by the record.

¶ 97 Specifically the record reflects that the APD was in fact aware of the content of the prior statements and grand jury testimony of Mr. Elmore and Ms. Paris Henderson. Therein, Ms. Paris Henderson indicated that she could not actually account for defendant's whereabouts at the time of

the murder and Mr. Elmore indicated that he was drunk on the night of the murder. " 'Where the circumstances known to counsel at the time of his investigation do not reveal a sound basis for further inquiry in a particular area, it is not ineffective for the attorney to forgo additional investigation.' " *People v. Tye*, 323 Ill. App. 3d 872, 883 (2001) (quoting *People v. Orange*, 168 Ill. 2d 138, 150 (1995)).

¶ 98 Moreover, the record also reflects that the APD did try to contact Mr. Elmore, but his efforts and the efforts of his investigators proved unsuccessful. "Counsel has only a duty to make reasonable investigations or to make a reasonable decision which makes particular investigations unnecessary, and the reasonableness of a decision to investigate is assessed applying a heavy measure of deference to counsel's judgment." *Orange*, 168 Ill. 2d at 149; *People v. Domagala*, 2013 IL 113688, ¶ 38 (same). Defendant has not identified what additional, reasonable steps the APD should have taken to locate Mr. Elmore. We, therefore, find that the APD's performance did not fall below an objective standard of reasonableness because he did not further investigate either Mr. Elmore or Ms. Paris Henderson as potential alibi witnesses. See *People v. Harris*, 206 Ill. 2d 1, 56 (2002) ("any decision by counsel to conduct a less-than-complete investigation would fall within the wide range of professionally competent assistance, so long as the decision [was] supported by a reasonable professional judgment").

¶ 99 With respect to Ms. Donna Henderson, there is absolutely nothing in the record to indicate what her trial testimony would have been. "Prejudice simply cannot be presumed" with respect to claims of ineffective assistance of counsel. *Glenn*, 363 Ill. App. 3d 173 (citing *People v. Johnson*, 128 Ill. 2d 253, 271 (1989)). A defendant fails to meet his burden to establish a reasonable

probability that a different result would have obtained, if only his trial counsel had further investigated or presented a potential witness, where there is nothing in the record to indicate that a potential witnesses' trial testimony would have been favorable to a defendant. *Id*. at 173-74 (citing *People v. Holman*, 132 Ill. 2d 128, 167 (1989) and *People v. Markiewicz*, 246 Ill. App. 3d 31, 47 (1993)).[5]

¶ 100 Finally, we note that the only other source of evidence for a possible alibi defense would have come from defendant himself. However, the record reflects defendant voluntarily chose not to testify at trial. Furthermore, defendant did not provide any details as to how he could support an alibi defense at the hearing on the posttrial motion other than indicating that he told the APD that he was not present when Mr. Davis was murdered and told the APD where he was at the time. In light of the above discussion, and without any more information about defendant's purported alibi, we find defendant has not shown that he was prejudiced by any improper personal philosophy the APD may have had about presenting an alibi defense.

¶ 101 2. Mr. Britten and Ms. Williams

¶ 102 In affidavits attached to defendant's supplemental posttrial motions, both Mr. Britten and Ms. Williams averred that they would have testified to being present during the fight between defendant and Mr. Love and that neither heard or saw anyone laugh at defendant or tell him he hit like a

[5] Although defendant does not specifically include her in his argument on appeal, we note again that at the hearing on the posttrial motion, defendant testified that he also provided the APD with the name of Ms. Jackson as a potential alibi witness. However, because the record does not contain any information about her potential testimony, the same discussion would apply with respect to any claim defendant was prejudiced by the APD's failure to interview her or present her at trial.

"bitch." Defendant contends that these potential witnesses would have called into question the prior statements of the State's witnesses to the contrary. Defendant, thus, contends that he was prejudiced because the APD improperly did not present them at trial, did not interview Mr. Britten at all before making this decision, and only briefly interviewed Ms. Williams at trial before deciding not to call her as a witness. We disagree.

¶ 103 The record reflects that, while the APD admittedly did not interview either of these two witnesses prior to trial, he did have an opportunity to interview Ms. Williams at trial before determining that her testimony would not have supported defendant's case and could in fact have been detrimental to the defense. Additionally, the APD was aware of the substance of Mr. Britten's potential testimony, as defendant himself had told the APD what Mr. Britten would say. Defendant's description, in fact, matched the contents of Mr. Britten's affidavit. With respect to Mr. Britten's possible testimony, the APD testified that one of the factors he considered as part of his trial strategy was that he did not want to add to a growing list of the people that were present at a fight involving defendant.

¶ 104 Effective assistance of counsel refers to competent, not perfect, representation. *People v. Palmer*, 162 Ill.2d 465, 476 (1994). Thus, a defendant must overcome the presumption that the challenged conduct might be considered sound trial strategy under the circumstances. *People v. Mims*, 403 Ill. App. 3d 884, 890 (2010). "Decisions involving what evidence to present and which witnesses to call fall within the broad category of trial strategy and are not subject to a claim of ineffective assistance unless they deprive a defendant of a meaningful adversary proceeding." *People v. Smith*, 2012 IL App (1st) 102354, ¶ 86 (citing *People v. Hamilton*, 361 Ill. App. 3d 836,

847 (2005)). Moreover, " '[n]either mistakes in strategy nor the fact that another attorney with the benefit of hindsight would have handled the case differently indicates the trial lawyer was incompetent.' " *Smith*, 2012 IL App (1st) 102354, ¶ 86 (quoting *People v. Negron*, 297 Ill. App. 3d 519, 538 (1998)).

¶ 105 Here, the APD had the opportunity to interview Ms. Williams before determining that her testimony would not be useful and could in fact be detrimental. While the APD did not elaborate on how he came to that conclusion, defendant did not ask him to do so at the hearing on the posttrial motion. Again, the APD's decision not to call Ms. Williams is presumed to be sound trial strategy under the circumstances (*Mims*, 403 Ill. App. 3d at 890), and the burden of overcoming that presumption and of proving incompetence rests with defendant, not the State. *People v. Bryant*, 391 Ill. App. 3d 228, 238 (2009). Without more information about what Ms. Williams told the APD at trial, we cannot say defendant has met this burden with respect to her potential testimony.

¶ 106 Furthermore, the APD was aware of the substance of Mr. Britten's potential testimony before he made the decision not interview him or to call him as a witness on behalf of the defendant. The APD explained that he did not want to add to the list of people that were present at defendant's fight with Mr. Love. While with the benefit of hindsight that decision might be viewed as questionable, and while another attorney may have handled defendant's case differently, this does not mean that the APD's decision amounted to unreasonable performance. *Smith*, 2012 IL App (1st) 102354, ¶ 86. Indeed, under the circumstances we cannot say that the APD's decision amounted to ineffective assistance because it " 'appears so irrational and unreasonable that no reasonably effective defense attorney, facing similar circumstances, would pursue such a strategy.' " *Bryant*, 391 Ill. App. 3d at

238 (quoting *People v. King*, 316 Ill. App. 3d 901, 916 (2000)).

¶ 107 Furthermore, even if we were to conclude that the APD's handling of Mr. Britten and Ms. Williams was deficient, defendant would still have the burden of establishing prejudice. *Glenn*, 363 Ill. App. 3d at 173. Defendant contends that these two witnesses would have refuted the State's evidence with respect to defendant's fight with Mr. Love, which was introduced to show defendant's motive and intent for the murder because Mr. Davis had mocked him. However, neither Mr. Britten nor Ms. Williams would have challenged the State's evidence with respect to defendant's prior fight with Damion, after which Mr. Davis started "laughing, hooping and hollering" and told defendant that he was a "big pussy." Because this evidence of defendant's motive and intent was essentially unchallenged, we cannot say defendant has shown a reasonable probability that the trial result would have been different but for the APD's handling of Mr. Britten and Ms. Williams. *Wheeler*, 401 Ill. App. 3d at 313.

¶ 108 3. Mr. Lopez

¶ 109 We now turn to defendant's contention that the APD was ineffective for his failure to investigate Mr. Lopez, his failure to present him as a witness at trial, and his improper attempt to present Mr. Lopez's statements to the police through testimony of Detective Hughes. We find defendant has not demonstrated prejudice resulting from any possible deficiency in the APD's failure to investigate Mr. Lopez or to properly present his testimony at trial.

¶ 110 Defendant seems to equivocate as to the nature of Mr. Lopez's potential testimony. While at one point defendant describes it as merely "potentially exculpatory," he also affirmatively contends the APD was aware that Mr. Lopez told police he saw three men run from the scene of the murder,

and defendant was not one of them. Furthermore, while defendant testified that the APD told him that this was indeed the case, the record does not support defendant's contention on this point.

¶ 111 It is uncontested that the APD never actually interviewed Mr. Lopez. Thus, the APD could not have obtained such information from Mr. Lopez himself. Moreover, defendant's assertion to the contrary, the APD never affirmatively testified that he otherwise came to understand that Mr. Lopez had told police defendant was not one of the men running away from the scene. Rather, the APD specifically testified that–based upon what he knew and what he was able to determine from the police reports–he understood that Mr. Lopez had never been shown a photo array or physical line up including defendant and that merely a "*possibility* [of] non-identification of the defendant still existed as it related to Martin Lopez." (Emphasis added.) The APD later testified that he generally understood that Mr. Martin "*may* be able to identify people that he saw after the shooting." (Emphasis added.)

¶ 112 Indeed, a police report tendered to the defense during discovery indicates that Mr. Lopez merely told police that "he only got a glimpse of them as they ran past, but did not rule out the possibility he could identify them if he saw them again." (Emphasis added.) Mr. Lopez himself was not called as a witness at the hearing on the posttrial motion, nor was an affidavit filed or an offer of proof made describing exactly what his trial testimony would have been.

¶ 113 As we noted above, prejudice cannot be presumed with respect to claims of ineffective assistance of counsel, and a defendant fails to meet his burden to establish prejudice resulting from his trial counsel's failure to investigate or present a potential witness where there is nothing in the record to indicate that a potential witness's trial testimony would have been favorable to a defendant.

Glenn, 363 Ill. App. 3d a 173-74. On the record before us, the contention that Mr. Lopez would have provided testimony favorable to defendant is speculative. In fact, and as the State argues on appeal, it is just as likely that he would have identified defendant as one of the men he saw running from the scene. It is also possible that Mr. Lopez would not have been able to identify any of the men. We, therefore, find defendant has not established any prejudice with respect to the APD's failure to investigate Mr. Lopez or to properly present his potential testimony at trial.

¶ 114 4. Overall Defense

¶ 115 We briefly address defendant's final challenge to the APD's performance. Defendant generally contends that, because the APD presented a minimal amount of "paltry, flawed, and insignificant testimony" from only two witnesses, he "did not put on any defense on [defendant's] behalf." However, other than the witnesses discussed above, defendant has not identified what additional evidence, testimony, or arguments the APD should have presented. Nor has he identified how any such evidence, testimony, or arguments would have aided his defense to the State's case. Again, it is defendant's burden to prove that defense counsel's performance fell below an objective standard of reasonableness and that this substandard performance caused defendant prejudice by creating a reasonable probability that, but for counsel's errors, the trial result would have been different. *Wheeler*, 401 Ill. App. 3d at 313. Defendant's generalized and unsupported complaints about the APD's failure to do more does not satisfy this burden.

¶ 116 E. Sentence

¶ 117 We next consider defendant's argument that sentencing him to 85 years' imprisonment was excessive, and that the trial court also improperly bifurcated its consideration of defendant's sentence

for first degree murder from the statutorily mandated firearm enhancement to that sentence.

¶ 118 A trial court may consider a number of factors to fashion an appropriate sentence, including the nature of the crime, protection of the public, deterrence, punishment, and defendant's youth, rehabilitative prospects, credibility, demeanor, and character. *People v. Kolzow*, 301 Ill. App. 3d 1, 8 (1998); see also 730 ILCS 5/5-5-3.1, 5-5-3.2 (West 2008) (providing various statutory factors in aggravation or mitigation). The weight attributed to each factor in aggravation or mitigation depends on the particular circumstances of each case. *Kolzow*, 301 Ill. App. 3d at 8. When a defendant challenges his sentence on appeal, we generally defer to the trial court's judgment because it had the opportunity to observe the proceedings and is, therefore, in a better position than a reviewing court. *People v. Stacey*, 193 Ill. 2d 203, 209 (2000). We will not substitute our judgment for that of the trial court merely because we would have weighed the sentencing factors differently. *Id*. Accordingly, we review the trial court's sentencing determination for an abuse of discretion and will reverse a sentence within the prescribed statutory limits only if it varies with "the spirit and purpose of the law" or is "manifestly disproportionate to the nature of the offense." *Id*. at 209-10.

¶ 119 Defendant was sentenced for his conviction of first degree murder, which subjected him to a prison term of "not less than 20 years and not more than 60 years." 720 ILCS 5/9-1(a)(1)(a) (West 2004). In addition, because he was also charged with and found guilty of personally discharging a firearm that proximately caused death to another person during the commission of the murder, it was statutorily mandated that "25 years or up to a term of natural life shall be added to the term of imprisonment imposed by the court." 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2004). Thus, defendant faced a possible sentence ranging from 45 years' imprisonment to natural life.

¶ 120 At the sentencing hearing, the State presented the trial court with the following evidence and arguments in aggravation: (1) victim impact statements from Mr. Davis's mother and two sisters, in which each described the pain of losing Mr. Davis just after he turned 17 years old; (2) juvenile findings of delinquency against defendant for possession of a stolen vehicle, aggravated assault and unlawful use of a weapon; (3) defendant's convictions as an adult for misdemeanor marijuana possession and for felony possession of a controlled substance with the intent to deliver, fraud, and drug conspiracy; and (4) reference to the violent nature of the murder at issue here, in which defendant shot Mr. Davis multiple times, intentionally killing the unarmed 17-year old simply because he had made a joke at defendant's expense. In light of this evidence and argument, the State asked the trial court to impose a sentence of natural life.

¶ 121 In mitigation, defendant presented the trial court with the following evidence and arguments: (1) defendant continued to maintain his innocence; (2) he was raised by a single mother in a tough neighborhood of Chicago; (3) he began using drugs and alcohol at age 14; (3) he had financial and emotional support from family; and (4) he had a nine-year-old daughter. Defendant asked the trial court to deny the State's request to impose a sentence of natural life, and to instead sentence him to the minimum amount of prison time allowed–45 years of incarceration.

¶ 122 The trial court indicated that it would "put aside" defendant's juvenile criminal history for purposes of sentencing. The trial court then specifically addressed the fact that defendant was raised by a single mother in a tough neighborhood, concluding that these facts did not excuse defendant's behavior. Finally, the trial court noted that it had absolutely no doubt about the facts of this case, which established defendant chased Mr. Davis down, shot him, and then shot him again after Mr.

Davis fell to the ground. Ultimately, the trial court concluded–after considering the information in the presentence investigation report, the victim impact statements, the facts of the case, and the arguments presented–that defendant should be sentenced not to natural life in prison, but to a total of 85 years' imprisonment. This sentence was comprised of a maximum sentence of 60 years' imprisonment for first degree murder, plus an additional 25 years' imprisonment which represented the minimum amount possible for the mandatory firearm enhancement.

¶ 123 On appeal, defendant first asserts that this sentence was excessive and reflects the fact that the trial court did not fully consider the evidence in mitigation or defendant's rehabilitative potential. We disagree. The record reflects that the trial court specifically discussed and considered the evidence presented in mitigation. Moreover, the trial court was not required to accord greater weight to the potential for rehabilitation than to other sentencing factors. *People v. Prince*, 362 Ill. App. 3d 762, 778 (2005). After weighing all the sentencing factors, the trial court rejected both the State's request for a sentence of natural life and defendant's request for a minimum sentence, concluding that an 85-year sentence was appropriate. We do not find that this sentence so varied with "the spirit and purpose of the law" or is so "manifestly disproportionate to the nature of the offense" that it amounts to an abuse of discretion. *Stacey*, 193 Ill. 2d at 209-10.

¶ 124 Second, defendant complains that while the trial court indicated that it would not impose a natural life sentence as a firearm enhancement, that statement was "illusory" because an 85-year prison sentence was effectively *greater* than a life sentence in light of the average life expectancy of the then 29-year old defendant. See 730 ILCS 5/3-6-3(a)(2)(I) (West 2010) ("a prisoner who is serving a term of imprisonment for first degree murder *** shall receive no good conduct credit and

shall serve the entire sentence imposed by the court").

¶ 125 Defendant did not challenge his sentence on this basis at the sentencing hearing or in his written motion to reconsider his sentence. A defendant generally forfeits sentencing issues when he does not object at the sentencing hearing, or include them in a written postsentence motion to reconsider. *People v. Moore*, 365 Ill. App. 3d 53, 67 (2006). Defendant's forfeiture aside, he has also not cited any case law to support his contention that his 85-year sentence rendered the trial court's comments illusory, nor has he provided any case law addressing what–if any–prejudice he suffered due to such purportedly illusory comments. Lastly, we note again that both defendant's actual 85-year sentence and a potential term of natural life imprisonment were permissible sentencing options available to the trial court, and we have already concluded that the sentence imposed was not an abuse of discretion. See also *People v. Teague*, 2013 IL App (1st) 110349, ¶¶ 35-39 (rejecting a similar argument under similar circumstances).

¶ 126 In defendant's final challenge to his sentence, one which he also did not raise in the trial court, defendant contends that the trial court erred by improperly bifurcating its consideration of defendant's sentence for first degree murder from the statutorily mandated firearm enhancement. Citing to *People v. Hauschild*, 226 Ill. 2d 63, 89 (2007), *People v. Guevara*, 216 Ill. 2d 533, 546 (2005), and *People v. Hill*, 199 Ill. 2d 440, 447 (2002), defendant contends that the trial court improperly failed to "consider the firearm enhancements as a fully integrated part of a single sentence, not as a separate, bifurcated sentence." We disagree.

¶ 127 First, while the cases cited by defendant do generally recognize the concept that the combination of an underlying sentence for a particular offense and a mandatory firearm enhancement

will result in a single, combined sentence, each did so in the context of discussing issues wholly unrelated to defendant's challenge here. *Id*. Second, none of these cases involve discussion of the implications of any improper "bifurcation" involved in the trial court's imposition of a sentence. *Id*.

¶ 128 Finally, the record reflects that the trial court did in fact properly consider the total number of years defendant would serve in prison when imposing a sentence in this case. At the sentencing hearing, the trial court stated: "Regarding the murder offenses, the Defendant will be sentenced to 60 years Illinois Department of Corrections. The gun enhancement will not be natural life, but it will be 25 years, for a total of 85 years Illinois Department of Corrections." The trial court's written sentencing order reflects defendant was sentenced "to 85yrs IDOC." Rather than reflecting any improper bifurcation or failure to focus on defendant's total sentence, the record shows that the trial court merely accounted for exactly how it arrived at the single, combined sentence it ultimately imposed upon defendant.

¶ 129 F. Presentence Custody Credit

¶ 130 Finally, we address defendant's request that he be granted a total of 1463 days of credit for the time he spent in presentence custody.

¶ 131 A defendant is entitled to credit against his sentence for time spent in custody prior to sentencing. 730 ILCS 5/5-4.5-100(b) (West 2010). In this case, defendant was granted a total of 1430 days of such presentence credit. However, the record reflects defendant was actually in presentence custody for 1463 days; *i.e.*, from the date of his arrest on November 1, 2006, up to but not including the date the mittimus was issued on November 3, 2010. See *People v. Williams*, 239 Ill. 2d 503, 509 (2011) (a defendant is not entitled to presentence credit for the day the mittimus is

issued).

¶ 132 The State concedes this issue on appeal, and we concur. Therefore, pursuant to Supreme Court Rule 615(b)(1) (Ill. S. Ct. R. 615(b)(1) (eff. Aug. 27, 1999)), we modify the mittimus in this case to grant defendant a total of 1463 days of presentence credit.

¶ 133 III. CONCLUSION

¶ 134 For the foregoing reasons, we affirm the judgment of the circuit court and correct the mittimus.

¶ 135 Affirmed; mittimus corrected.