FOURTH DIVISION
April 25, 2013

No. 1-11-2713

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. 09 CR 15667
	)	
JESUS DURAN,	)	Honorable
	)	James B. Linn,
Defendant-Appellant.	)	Judge Presiding.
	)	

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

ORDER

¶ 1 Held: The State proved defendant guilty beyond a reasonable doubt of first degree murder. Defendant was not denied his right to a fair trial where: (1) defendant forfeited his argument that the prosecutor made improper or prejudicial remarks and the comments did not amount to plain error; (2) defendant failed to show any error in trial court's decision to allow jury to view witness's statement; and (3) there was no showing that State obtained conviction through perjured testimony. We affirm defendant's conviction.

¶ 2 Following a jury trial, defendant Jesus Duran was convicted of first degree murder for the

beating death of Reynaldo Ortiz. Defendant was sentenced to 22 years in prison. On appeal, defendant challenges the sufficiency of the evidence and argues that the State failed to prove him guilty beyond a reasonable doubt. He also contends that he was denied his right to a fair trial because: (1) the State made improper and prejudicial remarks during closing argument; (2) the trial court erroneously allowed the jury to view a handwritten statement that had not been admitted into evidence; and (3) the State knowingly relied upon false testimony from the victim's cousin. For the reasons below, we affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was indicted for first degree murder in connection with the July 13, 2009, beating death of Reynaldo Ortiz that occurred on the 700 block of North Throop Street in Chicago, Illinois. Defendant was initially charged with two other individuals, Semajay Thomas and William Castillo.[1] However, defendant's case was severed and he was tried separately.

¶ 5 State's Case in Chief

¶ 6 *Reinaldo Gonzalez*

¶ 7 Reinaldo Gonzalez testified that, on July 12, 2009, he was with his cousin, Reynaldo Ortiz, Sr., playing softball and drinking alcohol in the park. At midnight, they left along with a friend, Gustavo to go to his house. Gustavo rode ahead on his bike. As Gonzalez and Ortiz were walking in the 700 block of Throop Street, Ortiz said "What's up bitches?" to a group of four or five people who were sitting on a porch. The group left the porch and ran after Ortiz, as

[1]This court affirmed Castillo's conviction on June 22, 2012 in *People v. Castillo*, 2012 IL App (1st) 110668. Thomas was acquitted.

Gonzalez "froze." He testified that he was standing approximately two houses away from his cousin. Gonzalez testified that the group beat his cousin to death and that afterwards, a light-complected Hispanic man, whom he identified in court as defendant, ran by him. Gonzalez then ran to his sister's house and called 911.

¶ 8 Gonzalez went to the police station on July 15, 2009, and looked at "[a] lot" of photographs from which he identified the individual who had run past him. On August 7, 2009, he went to the police station to view a line-up. He picked out the person who ran past him, whom he identified in court as defendant.

¶ 9 At trial, both sides focused their questions on *when* it was that defendant ran by Gonzalez. When asked on direct exam, whether it was before or after the beating, Gonzalez stated: "I think after the beating." When then asked "You think or are you sure?" Gonzalez stated "I'm sure."

¶ 10 On cross-examination, Gonzalez testified that, "after his cousin went down when he was being beaten," defendant ran past Gonzalez. Gonzalez did not see defendant "throw a punch at" or "kick" his cousin. He also testified that after [defendant] ran past him, his cousin "was already down."

¶ 11 On redirect examination, Gonzalez stated that when defendant ran by him, defendant was not running from the porch but was running "from the scene" which was "[w]here they beat [his] cousin up." He also stated that, by the time defendant ran by him, his cousin was not making any noise.

¶ 12 On recross examination, Gonzalez agreed that the beating had already started when

defendant ran past him. He testified that defendant was not running toward the beating; he was leaving the scene. He stated that when he spoke to the police two days after the incident, he could not remember telling them that "a light-skin[ned] Hispanic [ran] past him toward his cousin when the attack began." He admitted giving a statement to the police that "after [he] heard his cousin yell, [he] saw a light-skin[ned] guy run past [him] on the sidewalk." Gonzalez also admitted giving a written statement telling the police that he was "sure the guy ran past [him] after the beating had started but he [was] not sure if the beating had ended."

¶ 13 Gonzalez further testified on recross that he testified before the grand jury that [defendant] ran past him. He admitted that, when asked "Where did he run to?," he answered: "Towards my cousin." Gonzalez also admitted that he testified before the grand jury that "when [defendant] ran towards [his] cousin, *** the group of individuals [was] still around [his] cousin [who was] still on the ground." Gonzalez agreed that that was what he testified to because it was "the truth."

¶ 14 On re-redirect examination, Gonzalez testified that, in his handwritten statement, he said "after he heard his cousin yell [Gonzalez's nickname] he saw a light-skin[ned] guy run past him on the sidewalk" and "he [was] sure this guy ran past him after the beating had started but he [was] not sure if the beating had ended." Gonzalez also testified that although he said in the grand jury proceeding that defendant was running "towards" his cousin, as of the time of trial, Gonzalez remembered defendant running "away."

¶ 15 On re-recross examination, Gonzalez testified that his memory was better on the day he testified at trial than it was "within 48 hours of when this occurred and within a month of when

this occurred."

¶ 16 Defendant recalled Gonzalez to the stand and he admitted testifying at another trial in this matter on November 16, 2010 (*i.e.* Castillo's trial). The following colloquy occurred:

"Q: [A]t that time, *** do you recall being asked this question and giving this answer:

Question: Mr. Duran you knew was in the crowd?

Answer: He was running towards the crowd."

Do you remember being asked that question and giving that answer?"

A: I don't remember."

Lydell Brown

¶ 17 Lydell Brown, ("Little Man"), testified that he knew defendant, whose nickname was "Silent." He testified that defendant, Semajay Thomas, "Kill Bill," Terrence Washington ("Wes"), "Drama," David Najara [*sic*] (Indigo); David Calzado (Tarzan), and Mike Lozado were all members of the Satan Disciples street gang in July 2009. Brown stated he did not know the real names of defendant, Kill Bill or Drama. Brown testified that he had once also been, but no longer was, a member of a street gang. In July 2009, Brown had known David Calzado and Lorenzo McKinney for four years and had known defendant and Castillo for about three weeks. Brown denied being present at the time of the beating and denied any knowledge of what happened that night. He stated that he was with his grandmother and sister on July 12, 2009, from around 8 p.m. until the next day, July 13, 2009. On August 9, 2009, at around 7:50 p.m., Brown spoke to Detective John Madden and Assistant State's Attorney Bill Kelly at the police

station. Brown admitted that he gave a statement to ASA Kelly. The statement was inconsistent with his trial testimony.

¶ 18 Brown testified that ASA Kelly, after interviewing Brown, put together a four-page statement with exhibits, namely photographs of several individuals that included defendant, Thomas, and Castillo. Brown testified that ASA Kelly reviewed the statement with him but he was not allowed to make any changes or corrections. He also testified that the statement was a lie and that the police harassed him and forced him to lie. Brown conceded he did not tell ASA Kelly that the police harassed him and admitted he told Kelly that he had been treated well by the police and that they had not made any threats or promises.

¶ 19 In his written statement, Brown said he was "hanging out" with his friends on North Throop Street on July 13, 2009 when an argument broke out with "some older Hispanic guys." Brown's friends thought the men were being disrespectful. Brown testified that he told ASA Kelly that defendant "went up to one of the Hispanic men as they walked up the street and punched the man in the head about six times, and the man then fell to the ground, and Silent, Kill Bill, and Semajay Thomas continued to kick and punch the Hispanic man in the head and to his body." Brown admitted he told ASA Kelly that the beating went on for some time and then Wes broke it up.

¶ 20 Brown further admitted that when he testified before the grand jury on August 25, 2009, he stated that on July 13, 2009, he was "chilling, smoking and drinking" with Satan Disciples including defendant, Castillo, Thomas, Najara, Lozado, Calzado, Drama, and Washington. He stated that an argument broke out at 12:05 a.m. and he saw defendant, Thomas, Castillo, and

Ortiz across the street. He testified: "I seen [*sic*] Silent punch him, and then the victim lost his balance, and Semajay Punched him, and he fell in the street. And then all three of them started kicking and punching him." He stated that "Silent struck him first, and then Semajay struck him, and then the victim fell to the ground." Brown did not tell the grand jury that the police forced him to make a statement and he testified that he was treated "[g]ood" by the police. He also told the grand jury he was giving his statement freely and voluntarily.

¶ 21 Brown additionally testified that, on September 30, 2009, he gave a statement to Jerome White, an investigator working on behalf of Thomas. Brown told the investigator that he was not present on the night of the murder and that he was at his grandmother's house with his sister. He told the investigator that the police "grabbed " him off the street, took him to the police station, and told him that if he did not say what they wanted him to say, they would continue to harass his grandmother, sister, and girlfriend, and they would blame the murder on him.

¶ 22 Brown also testified that, on November 1, 2010, he went to the offices of defendant's counsel. Brown stated that he spoke to an attorney and a paralegal, but Brown did not testify at trial to the contents of that conversation.

¶ 23 *Lorenzo McKinney*

¶ 24 Lorenzo McKinney testified that he was not a Satan Disciple but was affiliated with them. On July 12, 2009, he was on the porch on Throop Street, drinking and smoking marijuana. He stated that there was a "whole bunch of other people" there. These included his two friends, Thomas and Calzado, Washington, whom he had known a couple of years, and McKinney's younger brother, Malik. Also present were three individuals whom McKinney knew only by

their nicknames, Kill Bill, Drama and Silent. He had known these three for only about a week. McKinney testified that Brown was not there. He stated that everyone present was a Satan Disciple, except Thomas.

¶ 25 While he was sitting on the porch, McKinney saw two older men in their forties or fifties drinking and walking on the opposite side of the street. One of the men said "bitch" and "motherfucker" directed not towards anybody in particular. Defendant, Thomas, and Kill Bill approached the men. Only one man was assaulted. McKinney stated that he saw them "hit, punch, kick." He testified that, specifically, Thomas "pushed them away," Castillo "threw a punch,"and defendant "threw a punch." McKinney stated that the punch from defendant landed on the man's jaw. He testified that defendant punched the man once and Castillo punched him two times. He described the punch from defendant as being done with a closed "fist." After that, the man fell and Castillo kicked the man two times in the head. McKinney testified that defendant did not kick the man; he "just punched him" and stood by. Then, according to McKinney everybody "scattered like rats." McKinney went to his mother's house. He testified that the three men who were not from his neighborhood - defendant, Kill Bill, and Drama - jumped into a car.

¶ 26 McKinney testified that he was picked up by the police on August 5, 2009. He thought he was under arrest for a murder he did not commit. He testified that the first time the police spoke to him he told them he had not seen at thing and he stated at trial that that was the truth. On August 7, 2009, he gave a handwritten statement which he testified the police forced him to write. However, he also testified at trial that the statement was true, though contrary to the

version he had just testified to at trial. At trial, he testified that he saw three people beat up a Latino man and that defendant was one of them.

¶ 27 McKinney testified that he went to the grand jury on August 25, 2009 and that he told the grand jury the truth. He testified before the grand jury that he never left the porch on the night of the beating.

¶ 28 McKinney also testified that, on October 28, 2009, he gave a statement to Jerome White, an investigator for Thomas. He gave the statement at Thomas's house. He told White that he was not present at the time of the beating. McKinney told White that he had told the police that he was not there, and therefore he could not tell the police "who was out there." He also told White that everything he had said in his statement and everything he had told the grand jury was a lie.

¶ 29 During cross-examination, McKinney testified that what he told the investigator about his not being there on the night of the beating was true. He also testified during cross-examination that he was not there that night. At this point, the following dialogue occurred:

> "[DEFENSE COUNSEL]: So, what you just testified to on direct examination to the Prosecutor where you say you saw these things --
>
> [MC KINNEY]: Whatever was read, that statement, all my statements are false. Those are wrong. They forced me to do it. I wasn't going down for it. That was just that.
>
> [DEFENSE COUNSEL]: So, when you testified on direct examination, sir, a minute ago in front of this jury that you were there that night and you saw

people beating Mr. Ortiz, is that a lie, too?

[MC KINNEY]: No."

McKinney then testified that the police told him that if he did not tell them what they wanted him to say, they were going to "put a case" on him." He further stated that this was what he told the investigator for Thomas. He testified that the first thing that he had told the police when he was picked up - that he had not seen a thing – was the truth.

¶ 30 Redirect examination started as follows:

"[ASSISTANT STATE'S ATTORNEY]: You testified just a few minutes ago when I was asking you questions that you saw three people beat up a Latino; is that correct?

[MC KINNEY]: That is what my statement says.

[ASSISTANT STATE'S ATTORNEY]: Is that what you saw?

[MC KINNEY]: According to the statement, yes.

[ASSISTANT STATE'S ATTORNEY]: I am asking you what you saw with your eyes.

[MC KINNEY]: Yes.

[ASSISTANT STATE'S ATTORNEY]: You saw with your own eyes three people beat up a Latino; is that correct?

[MC KINNEY]: Correct.

[ASSISTANT STATE'S ATTORNEY]: And was one of those people Silent [defendant]?

[MC KINNEY]: Correct."

The State then questioned McKinney regarding the October 28, 2009 statement that he had given to the investigator for his friend, Thomas:

"[ASSISTANT STATE'S ATTORNEY]: And you told them that you were never out there?

[MC KINNEY]: Correct.

[ASSISTANT STATE'S ATTORNEY]: And is that the truth, or is that a lie?

[MC KINNEY]: A lie.

[ASSISTANT STATE'S ATTORNEY]: The entire statement you told the investigator was a lie.

[MC KINNEY]: A lie.

[ASSISTANT STATE'S ATTORNEY]: What is the truth then?

[MC KINNEY]: They were out there. I was there. They were out there.

[ASSISTANT STATE'S ATTORNEY]: And you saw it?

[MC KINNEY]: And I saw it."

McKinney then testified that he told the truth at the police station to the assistant state's attorney. He also testified that he told the truth to the grand jury, and that he had told the grand jury the same thing he had just told the prosecutor.

¶ 31 On recross examination, McKinney again testified that he stayed on the porch at the time of the beating and that Brown was not there.

¶ 32 *Dr. Michael Humilier*

¶ 33 Dr. Michael Humilier, an expert forensic pathologist, testified that he performed the post-mortem examination on Ortiz. At the time of the autopsy, Ortiz's blood alcohol level was 0.271 and he had cirrhosis of the liver. The external examination revealed 13 injuries: (1) a laceration and bruise to the right top of the head that exposed the underlying skull because the tissue was torn all the way down to the skull; (2) a bruise on the right eyelid; (3) a laceration with a surrounding abrasion to the bridge of the nose; (4) an abrasion or scrape to the midline of the forehead; (5) an abrasion to the left side of the face near the left eye; (6) a bruise on the left cheek; (7) a bruise on the right cheek; (8) an abrasion on the nose; (9) an abrasion on the left side of the upper lip; (10) an abrasion on the right side of the chin; (11) an abrasion on the left side of the chin; (12) an abrasion to the front right knee; and (13) a healing wound on the front left knee. Eleven of the external injuries were concentrated on Ortiz's head. Dr. Humilier testified that the injuries were consistent with a blunt force trauma that is caused by an object hitting another object. He concluded that Ortiz's injuries to his face were consistent with being punched or kicked in the face.

¶ 34 Dr. Humilier also testified regarding the injuries he observed during his internal examination including: (1) a subgaleal hemorrhage (bleeding) that measured three inches by four inches on the right side of the scalp; (2) a subgaleal hemorrhage that measured three inches by five inches to the top of the scalp; (3) a subgaleal hemorrhage on the left side of the scalp; (4) a subgaleal hemorrhage that measured 1½ inches by 1½ inches to the back of the scalp; (5) a fracture extending into the base of the skull bone above the right eyebrow, specifically on the

right side of the frontal bone of the skull; and (6) cerebral edema which is swelling of the brain. Dr. Humilier concluded that these internal injuries were also consistent with blunt force traumas and with being kicked or stomped.

¶ 35 Dr. Humilier testified that it was his opinion, within a reasonable degree of scientific certainty, that Ortiz died from cranial cerebral injuries due to blunt force head trauma due to assault. Dr. Humilier testified that the injuries he saw, which were on three sides of Ortiz's body, were not consistent with a fall and that for the skull fracture in the frontal bone of the skull to have occurred, more impact than a simple fall to the ground was required.

¶ 36 *David Calzado*

¶ 37 David Calzado testified that, on July 13, 2009, he had known McKinney and Washington for about ten years, and Brown for about seven years. He had known Thomas and McKinney's younger brother, Malik, his whole life. He stated he had known defendant, Castillo and Drama for about one month. Calzado testified that he was not a member of a street gang, he used to be an "SD," and he did not know what "SD" stood for. He testified that defendant, Castillo, Drama, Washington and Brown were all members of the SD street gang. He also testified that he saw Brown the day after the beating but did not think he saw him there on the night of the beating

¶ 38 Calzado stated that he was on the porch with several other individuals on July 13, 2009, when an "old Latino guy" who was walking by said something to Thomas and the two started arguing. Calzado stated that Thomas and Castillo ran off the porch. He testified that he did not "remember" defendant getting off the porch. When the State asked Calzado, over objection, where defendant was at the time Ortiz "got stomped," Calzado answered; "I didn't see him by the

victim." Calzado testified that Thomas punched Ortiz "a lot" and Castillo "stomped him" - once - in the head. Calzado told everyone to go and everybody left. Calzado stated that he got into Castillo's car with him, McKinney, defendant and two others. Castillo drove to a gas station where he went out to wipe blood off his leg. He returned to the car and drove Calzado home.

¶ 39 Three weeks later, while in jail on an unrelated traffic offense and a warrant, Calzado contacted the police. Detectives interviewed Calzado on August 4, 2009 at the Cook County jail.

¶ 40 *Terrence Washington*

¶ 41 Terrence Washington testified that he had never been in a street gang. He stated that he knew McKinney, Calzado and Thomas, but did not know if any were in a gang. He testified that he did not know anyone who was a member of the Satan Disciples street gang. He also testified that he did not know anyone with a nickname of Kill Bill, Drama or Silent. Washington admitted being present and sitting on the porch at 700 Throop on the night of the beating but denied seeing two individuals walk by and denied seeing Thomas, Castillo and defendant leave the porch or attack Ortiz.

¶ 42 Washington admitted giving a statement to police officers and Assistant State's Attorney Suzi Collins on August 7, 2009, but stated at trial that they "rehearsed" him through it and told him what to say. He denied reading the statement and denied the initials on the corrections were his. He denied telling ASA Collins that he was giving his statement voluntarily. He denied telling ASA Collins that he saw Thomas punch the man in the face, Silent strike the man in the head, or Kill Bill stomp on the man's head once after he was on the ground. He also denied telling her that he never saw Ortiz strike anyone.

¶ 43 Washington also admitted appearing before the grand jury on August 19, 2009, but at trial claimed he could not remember giving any of his testimony to the grand jury.

¶ 44 Washington testified that he had known Thomas all his life. He also stated that Thomas was a highly-trained boxer whom he had seen knock out people with his fist.

¶ 45 *Assistant State's Attorney Araceli Reyes Delacruz*

¶ 46 Assistant State's Attorney Araceli Reyes Delacruz testified that she spoke to Washington before he testified before the grand jury and he never told her that ASA Collins or the police had told him what to say. Washington's grand jury testimony was published to the jury. He testified he was a member of the Satan Disciples street gang and acknowledged that he knew defendant and Castillo who were also Satan Disciples. He also testified before the grand jury that after Ortiz cursed at the men on the porch, Thomas, Castillo, Drama, and defendant "rushed off" the porch. He stated that he saw Thomas punch the man in the jaw and saw Castillo stomp on Ortiz. Washington testified that he saw defendant hit the man in the head. He also stated that he had reviewed the statement he had given to ASA Collins, in which he made the same statements as he had before the grand jury. He stated that no one made any promises or threats in order to get him to make the statement.

¶ 47 *Assistant State's Attorney Suzi Collins*

¶ 48 Assistant State's Attorney Suzi Collins testified that she interviewed both McKinney and Washington, both had an opportunity to be alone with her, and neither complained about mistreatment by the police. ASA Collins took a handwritten statement from Washington. It was published to the jury. In his statement, Washington stated that he saw Thomas punch Ortiz in the

face, defendant hit Ortiz in the head, and Castillo stomp on Ortiz's face as he lay on the ground, and that he never saw Ortiz hit anyone.

¶ 49 *Detective John Madden*

¶ 50 Detective John Madden testified that he was involved in the investigation of Ortiz's murder, with his partners Michael Moreth and Michael Kennedy. On July 15, 2009, the three spoke to tactical officers. Those officers told Detective Madden that they had filled out two separate contact cards for defendant and Washington, whom the officers had stopped at 11:40 p.m. on July 12, 2009, on the 700 block of Throop. Madden also testified regarding his continued investigation.

¶ 51 Detective Madden stated that he interviewed defendant at the police station on August 6, 2009. Defendant's hands had four healing injuries near the knuckles consistent with those sustained by a person who has been involved in a fight or struck something or someone with their hands. Defendant was placed in a line-up. When Ortiz's cousin, Gonzalez viewed the line-up, he became visibly shaken, started to cry, and stated that defendant was one of the individuals who had hurt Ortiz.

¶ 52 Detective Madden also testified that, on August 9, 2009, he located Brown who agreed to come to the police station. Madden was present when Brown gave a handwritten statement to ASA Kelly.

¶ 53 On cross-examination, Detective Madden stated that when Gonzalez identified defendant in a photograph he told him that defendant was the individual who ran past him toward his cousin who was being attacked.

¶ 54 *Detective Roger Sandoval*

¶ 55 Detective Roger Sandoval testified that he interviewed Calzado on August 4, 2009, while Calzado was in jail on a traffic offense. Calzado told Sandoval that Thomas and Castillo had been involved in an altercation. Sandoval also learned about individuals, including Washington, who may have information regarding the murder investigation. Sandoval spoke to Washington on August 5, 2009, and McKinney on August 6, 2009. Sandoval testified that he did not force McKinney to say anything. Sandoval further testified that he did not threaten either McKinney or Washington that he would "put a case on him" if he did not speak to Sandoval.

¶ 56 The parties then entered into several stipulations regarding physical evidence, which included stipulating that DNA collected from the scene matched only the decedent's DNA profile, and that no fingerprints were found that were suitable for comparison or identification.

¶ 57 Defendant's Case

¶ 58 Defendant called only one witness, private investigator, John Rea. Rea testified that he measured the distance from the scene of the murder to the stoop where the witnesses claimed to be standing, and the distance was 204 feet.

¶ 59 Closing arguments were presented to the jury. The court then instructed the jury on the law including the use of prior inconsistent statements as substantive evidence.

¶ 60 During deliberations, the jury made several requests for trial transcripts, handwritten statements, and grand jury testimony. These requests were granted in part. The jury found defendant guilty of first degree murder. He now appeals.

¶ 52 ANALYSIS

I. Sufficiency of the Evidence

¶ 61 Defendant challenges his conviction for first degree murder based on the sufficiency of the evidence. Where a defendant challenges the sufficiency of the evidence, our standard of review is well-settled. As our supreme court has explained:

> "[T]he State carries the burden of proving beyond a reasonable doubt each element of an offense. [Citations.] Where a criminal conviction is challenged based on insufficient evidence, a reviewing court, considering all of the evidence in the light most favorable to the prosecution, must determine whether any rational trier of fact could have found beyond a reasonable doubt the essential elements of the crime. [Citations.] Under this standard of review, it is the responsibility of the trier of fact to fairly * * * resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. [Citations.] Therefore, a reviewing court will not substitute its judgment for that of the trier of fact on issues involving the weight of evidence or the credibility of witnesses. [Citations.] A criminal conviction will not be set aside unless the evidence is so improbable or unsatisfactory as to create a reasonable doubt of the defendant's guilt. [Citations.]" (Internal quotation marks omitted.) *People v. Siguenza–Brito*, 235 Ill. 2d 213, 224 (2009).

¶ 62 Defendant was convicted of first-degree murder pursuant to section 9-1(a) which provides that a person is guilty when he kills an individual without lawful justification if, in performing the acts which cause the death, he intends to kill or do great bodily harm to that individual, or he

knows that his acts will cause death or that they created a strong probability of death or great bodily harm to that individual. 720 ILCS 5/9-1(a)(West 2008). The evidence, when viewed in the light most favorable to the prosecution, established that defendant, Castillo and Thomas together punched and kicked Ortiz in the head. Ortiz sustained significant injuries to his head including a fracture, several subgaleal hemorrhages, and brain swelling. The evidence established that when defendant, Thomas and Castillo beat Ortiz they intended to kill him or do great bodily harm, knew they would kill him or do great bodily harm, or knew there was a strong probability that he would die or suffer great bodily harm.

¶ 63 The discrepancy in the size and strength of *Ortiz* compared to that of defendant, Castillo and Thomas was significant. Ortiz was fifty-years old, in poor health, suffering from cirrhosis of the liver and grossly intoxicated, with a blood alcohol level of .271. Defendant was twenty-one years old and Thomas was a highly trained, physically fit boxer who could knock people out. Theses disparities in age and physical condition made it evident that when defendant, Castillo, and Thomas punched and kicked Ortiz repeatedly in the head that Ortiz would die or suffer great bodily harm. See *People v. Castillo*, 2012 IL App (1st) 110668.

¶ 64 Although defendant did not inflict every blow to Ortiz that resulted in his death, he was accountable for the acts of Castillo and Thomas. Under Illinois law, a person can be held accountable for the fatal conduct of another person if "[e]ither before or during the commission of an offense, and with the intent to promote or facilitate such commission, he solicits, aids, abets, agrees or attempts to aid, such other person in the planning or commission of the offense." *People v. Perez*, 189 Ill. 2d 256, 266 (2000), quoting 720 ILCS 5/5-2(c). To prove

accountability, the State must demonstrate beyond a reasonable doubt that either (1) defendant shared the principal's criminal intent or (2) there was a common criminal design. *Id*. When two or more persons engage in a common criminal design, any acts committed by one party to further the common design are attributable to all parties to the common design, rendering each party individually responsible for the consequences of the others' acts. *Id*. at 267.

¶ 65 Although defendant attempts to distinguish the case of *People v. Mullen*, 313 Ill. App 3d 718 (2000), we agree with the State that it is similar to the instant case. In *Mullen*, a group of 10 to 15 men, including the defendant, ran after a pickup truck and dragged the victim out of the truck. One of the men in the crowd pulled a tool from the victim's tool belt and began hitting him on the head while others in the group kicked and hit him. The defendant stood over the victim while a codefendant kicked the victim and another man hit the victim in the head with a baseball bat. When finished, the group, including the defendant and the codefendant, walked away. *People v. Mullen*, 313 Ill. App. 3d at 725-26. This court upheld the defendant's conviction for first-degree murder concluding that the evidence was sufficient to prove him guilty under a theory of accountability. Even though no witness saw the defendant hit or kick the victim, he was accountable for the actions of the group because he shared the criminal intent of the group and participated in the common criminal design to harm the victim. *Id*. The same holds true here, except there was evidence in the instant case that defendant hit Ortiz.

¶ 66 Defendant argues that the State's evidence consisted only of recanted prior inconsistent statements that are legally insufficient to sustain a guilty verdict. We disagree. As this court has explained:

> "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 admissible under section 115–10.1 of the Code of Criminal Procedure of 1963. [Citations.] There are no suspect categories of properly admitted evidence that require a different standard of appellate review. [Citation.] In other words, when a defendant is convicted and then appeals, one standard of review applies to all evidence. [Citation.] A properly admitted prior inconsistent statement under section 115–10.1 is, by virtue of its admissibility, reliable and voluntary.[Citation.]. The trier of fact may consider a prior inconsistent statement introduced as substantive evidence under section 115–10.1 the same as direct testimony by that witness. The trier of fact is free to accord any weight to such properly admitted statements based on the same factors it considers in assessing direct testimony. [Citation.] Once a jury or trial court has chosen to return a guilty verdict based upon a prior inconsistent statement, a reviewing court not only is under no obligation to determine whether the declarant's testimony was substantially corroborated or clear and convincing, but it may not engage in any such analysis.[Citations.] " (Internal quotation marks and emphasis omitted.) *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 23.

"Section 115–10.1 is meant to advance the legislature's goal of prevent[ing] a turncoat witness from merely denying an earlier statement when that statement was made under circumstances indicating it was likely to be true." (Internal quotation marks omitted.) *People v. White*, 2011 IL

App (1st) 092852, ¶ 52. Once those statements are admitted as substantive evidence under section 115-10.1, it is the province of the jury to weigh those statements. The recanted statements here, while not the only evidence of defendant's guilt, established that he participated in the beating.

¶ 67 In support of his argument, defendant cites several inapposite cases including *People v. Brown*, 303 Ill. App. 3d 949 (1999), *People v. Arcos*, 282 Ill. App. 3d 870 (1996); *People v. Reyes*, 265 Ill. App. 3d 985 (1993) and *People v. Parker*, 234 Ill. App. 3d 273 (1992). Unlike those cases, the recanted statements here did not constitute the sole evidence in the case.[2] Here, Gonzalez placed defendant at the scene of the beating. At trial, McKinney testified that he saw three people beat up a Latino man and that defendant was one of them. McKinney stated defendant punched Ortiz and fled the scene when the beating ended. Although there were inconsistencies in their testimony, these were presented to the jury whose job it is to weigh evidence and determine what testimony to believe. See, *e.g.*, *People v. Cunningham*, 212 Ill. 2d 274, 283 (2004) (it is for the trier of fact to decide how flaws in part of the testimony affect the credibility of the whole); *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 22 ("That one witness's testimony contradicts the testimony of other prosecution witnesses does not render each witness's testimony beyond belief. The trier of fact is free to accept or reject as much or as little of a witness's testimony as it pleases.").

¶ 68 Brown's handwritten statement and grand jury testimony were admitted as substantive

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[2]This court has additionally distinguished *Brown* where as here, the applicable statute is section 115–10.1. See *People v. Tolliver*, 347 Ill. App. 3d 203, 219 (2004) ("the applicable statute here is section 115–10.1, not section 115–10.2 as in *Brown*").

evidence and established that defendant, Castillo and Thomas walked up to Ortiz, defendant punched Ortiz who fell to the ground and defendant, Castillo and Thomas punched and kicked Ortiz. Washington's handwritten statement and grand jury testimony were introduced as substantive evidence and established that defendant, Castillo, and Thomas rushed towards Ortiz, that Thomas hit Ortiz in the face and Ortiz fell to the ground, Castillo stomped on Ortiz's head and defendant hit Ortiz in the head. Although Brown claimed he lied in his statements because the police harassed both him and Washington, the police threatened him, and both the police and the ASA rehearsed the statement with him, these claims were contradicted by the State's witnesses ASA Reyes, ASA Collins, and Detective Sandoval, who testified to the contrary.

¶ 69 The evidence in this case, when viewed in the light most favorable to the prosecution, was sufficient to establish that defendant intended or knew that Ortiz would die or suffer great bodily harm when he, Castillo, and Thomas punched and kicked Ortiz in the head. The evidence also established that Ortiz died as a result of the injuries he sustained during the beating by defendant, Castillo, and Thomas. The State proved defendant guilty of first degree murder beyond a reasonable doubt.

¶ 70 II. Remarks During Closing Argument

¶ 71 Defendant next argues that he was denied his right to a fair trial where the State made improper and prejudicial remarks during closing argument. He contends that the State asserted that Ortiz's murder had a gang-related motive and exceeded the bounds of appropriate prosecutorial comment by referring to the incident as a gang "execution." Defendant also contends that the State's arguments, regarding Calzado's account of the murder, witnesses' drug

and alcohol use, the medical examiner's opinion, and the cause of particular injuries, were based on speculation and not facts in evidence.

¶ 72 Defendant concedes he has forfeited review of this error because he did not object during closing argument. See *People v. Enoch*, 122 Ill.2d 176, 186 (1988) (to preserve an alleged error for review, both an objection at trial and a written posttrial motion raising the issue are necessary). Nonetheless, the plain-error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Defendant asserts that we must consider his unpreserved issues under the plain error doctrine because the evidence here was at best closely balanced. A reviewing court can consider a forfeited error where:

> "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Sargent*, 239 Ill. 2d 166, 189 (2010).

A defendant bears the burden of persuasion under each prong of the plain-error test. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009). Generally, the first-step of plain-error review is to determine whether any error occurred. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). However, where, as here, the only basis for plain-error review is a claim that the evidence was closely balanced, we need not first look at whether an error occurred. *People v. White*, 2011 IL 109689, ¶ 148.

¶ 73 In *White*, the Illinois Supreme Court "acknowledge[d] that, as a matter of convention, [it had] typically undertaken plain-error review by first determining whether error occurred at all. *Id.*, ¶ 144. However, the court decided:

> "Where the only basis proffered for plain-error review is a claim that the evidence is closely balanced, an assessment of the impact of an alleged evidentiary error is readily made after reading the record. *When it is clear that the alleged error would not have affected the outcome of the case, a court of review need not engage in the meaningless endeavor of determining whether error occurred*." (Emphasis added.) *Id.*, ¶ 148.

As the *White* court explained:

> "The procedural-default rule *** is a doctrine adhered to by the courts to conserve judicial resources and to respect the law's important interest in the finality of judgments. In this context, a procedure that requires Illinois courts of review to examine and address claimed evidentiary errors that could not have affected the outcome runs contrary to the very purpose of the procedural-default rule." (Internal quotation marks omitted.) *Id.*, quoting *Massaro v. United States*, 538 U.S. 500, 504 (2003).

The prerequisites of the plain error rule have not been met here where defendant has not established that the evidence was closely balanced. The evidence, as outlined earlier in more detail, showed that numerous members of the Satan Disciples street gang were hanging out on a porch when an obviously intoxicated, older man, Ortiz, began swearing at them. The evidence

established that an argument ensued and that defendant, Castillo, and Thomas rushed off the porch and proceeded to punch and kick Ortiz in the head until he died. Thus, since the evidence was not closely balanced, any clear error, if one existed at all, would not be plain error.

¶ 74 III. Brown's Statement

¶ 75 Defendant next argues that he was denied a fair trial because the court erroneously allowed the jury to view a handwritten statement that he asserts had not been admitted into evidence. After the jurors had deliberated for an hour, they sent out a note requesting the transcripts of Washington's initial written statement and grand jury testimony, both of which had been read into the record in their entirety by the ASAs who took the statements. The jury also requested "[a]ll original and Grand Jury Statements on all four witnesses." Defendant now argues that the court erred when it sent Brown's written statement back to the jury.

¶ 76 " 'The decision whether to allow jurors to take exhibits into the jury room is left to the sound discretion of the trial court. [Citation.]' " *People v. White*, 2011 IL App (1st) 092852, ¶ 59. We will not reverse the trial court's decision "unless there is an abuse of discretion to the prejudice of the defendant." *Id.*, see also *People v. Williams*, 97 Ill. 2d 252, 292 (1983).

¶ 77 As the State notes, Brown testified at trial that he was with his grandmother and sister on July12, 2009, from around 8 p.m. until July 13, 2009. He also testified that he spoke to ASA Kelly and Detective Madden at the police station and gave a handwritten statement on August 9, 2009. Brown identified the State's exhibit number 3 as his statement. He acknowledged the contents of the statement at trial.

¶ 78 In his statement, Brown said he was "hanging out" with his friends on North Throop

Street on July 13, 2009 when an argument broke out with "some older Hispanic guys." Brown's friends thought the men were being disrespectful. Brown stated that defendant went up to one of the men and punched the man in the head about six times. Brown stated that the man then fell to the ground, and defendant, Castillo, and Thomas continued to kick and punch the man in the head and body. Brown stated that the beating went on for some time until Wes broke it up. Brown was subject to cross-examination about the statement. The trial court subsequently granted the State's request that Exhibit 3 be admitted into evidence, as part of its request to admit Exhibits 1 through 43 into evidence.

¶ 79 When the jury requested "[a]ll original and Grand Jury Statements on all four witnesses," the court expressed concern that it would be giving the jury more evidence than what was received at trial because the entirety of the statements and the Grand Jury testimonies was not read to the jury. The State agreed that Brown's handwritten statement contained additional information. The court asked if Brown admitted to making the statement. The State read the court the portion of the trial transcript where Brown acknowledged that the statement was his, that he signed it, and that he stated what was contained in the statement. Although the State argued that the foundation for introduction of the statement into evidence was accomplished through Brown who authenticated it, defendant argued that it was never offered into evidence as an exhibit in the same manner as Washington's statement and grand jury testimony., *i.e.*, the ASA who took Brown's statement did not take the stand and present it line-by-line. The court ruled that it would allow the jury to have the statement because the foundation had been laid, the witness had acknowledged the statement, but told defendant that, if defendant wanted, the court

would redact anything in the statement that was not elicited when Brown testified at trial.

¶ 80 Although defendant has argued that "he was denied a fair trial because the court erroneously allowed the jury to view a handwritten statement that he asserts had not been admitted into evidence," the State contends that defendant has forfeited this argument by failing to comply with Illinois Supreme Court Rule 341 (h) (eff. July 1, 2008). The State has correctly noted that the redacted statement is not in the record. Also, as the State further notes, there is no indication in the record if Brown's statement ever reached the jury before it rendered its verdict.

¶ 81 Rule 341(h)(7) provides that the appellant's brief shall include an argument containing the appellant's contentions, the reasons therefor, citation of the authorities, and the pages of the record on which the appellant relies. The Rule further provides that parties waive any points not argued. "A reviewing court is entitled to have issues clearly defined with pertinent authority cited and cohesive arguments presented, and it is not a repository into which an appellant may foist the burden of argument and research; it is neither the function nor the obligation of the Appellate Court to act as an advocate or search the record for error." *People v. Universal Public Transportation, Inc.*, 2012 IL App (1st) 073303-B, ¶ 50, citing Rule 341(h)(7). Moreover, we "presume that the trial court judge would not have admitted the exhibits if the State had not laid proper foundations for them, because we ordinarily presume that the trial judge knows and follows the law unless the record indicates otherwise." (Internal quotation marks omitted.) *Id*.

¶ 82 In any event, forfeiture aside, defendant's argument fails on the merits. First, although the parties disputed, and still dispute, whether the statement was admitted into evidence, the record shows that it was. Moreover, we agree with the State that defendant's reliance on *People v. Carr*,

53 Ill. App. 3d 492 (1977), for his assertion that Brown's statement was not admitted into evidence, is misplaced. In *Carr*, the trial court committed reversible error where it allowed prior inconsistent statements which had not been admitted into evidence to be sent back to the jury without instructions that the statements were not to be used as substantive evidence. The instant case is distinguishable because the statement here *was* admitted into evidence. More importantly, Brown's statement was properly admitted as *substantive* evidence.

¶ 83 IV. State's Purported Reliance on Perjury

¶ 84 Defendant's final argument is that the State knowingly relied upon false testimony from the victim's cousin, Reinaldo Gonzalez. It is undisputed that Gonzalez never claimed to see defendant punch or kick his cousin and Gonzalez consistently stated that he did not see his cousin being beaten, but only heard him yelling. Gonzalez also consistently stated that he saw defendant run past him at the time of the offense and he later identified defendant as the individual who ran past him. The focus of defendant's argument is on the point in time defendant ran past Gonzalez, specifically, whether defendant was running: (a) “towards” Ortiz while the beating was already in progress (indicating defendant did not take part) or (b) “from” the scene of Ortiz's beating (indicating defendant had taken part). The gist of defendant's argument is that Gonzalez falsely claimed at trial that defendant ran past him “from” the scene of the crime, and that Gonzalez had previously stated that defendant ran past him “towards” Ortiz as he was already being beaten, presumably by other individuals. Defendant further argues that the inconsistent testimony amounted to perjury and that the State knowingly presented perjured testimony.

¶ 85 A conviction obtained through the use of false evidence has long been recognized by both the Illinois Supreme Court and the United States Supreme Court as a violation of due process. See *People v. Coleman*, 183 Ill. 2d 366, 391 (1998), citing *Giglio v. United States*, 405 U.S. 150, 153-54 (1972). It is well settled that a conviction obtained through the knowing use of perjured testimony must be set aside. *People v. Lamon*, 346 Ill. App. 3d 1082, 1094 (2004). The burden of proving that the State knowingly used perjured testimony lies with the defendant. *People v. Smith*, 139 Ill. App. 3d 21, 30 (1985), citing *People v. Bassett*, 56 Ill. 2d 285, 293 (1974); accord *People v. Craig*, 334 Ill. App. 3d 426, 439 (2002). A person commits perjury when, under oath or affirmation, he makes a false statement, material to the issue or point in question, which he does not believe to be true. See 720 ILCS 5/32-2 (West 2000).

¶ 86 Regarding Gonzalez's inconsistent statements, as noted above, there were inconsistencies in Gonzalez testimony regarding the point at which he saw defendant run past him. At trial Gonzalez testified that he saw defendant run away from the beating scene and past him after the beating. He also testified that two days later, on July 15, 2009, he went to the police station where he identified defendant from a photo array as the person who had run past him. Gonzalez testified that he *did not remember* telling the police that defendant ran past him "towards" Ortiz when the attack began. However, immediately after stating he did not remember, the colloquy occurred:

> "[DEFENSE COUNSEL]: And do you remember identifying Jesus Duran to the police as the individual who ran past you towards your cousin who was being attacked?

[ASSISTANT STATE'S ATTORNEY]: Objection. Asked and Answered.

[DEFENSE COUNSEL]: Do you remember telling that to the police within 48 hours of this actually occurring?

[THE COURT]: Overruled.

[GONZALEZ]: Yes."

However, in his posttrial motion, defendant attached a copy of the July 15, 2009 report prepared by Officers Michael Moreth and John Madden who interviewed Gonzalez. The report is contained in the record but it is not a signed statement by Gonzalez. In the report the officers note "Gonzalez stated that he remembered a light skin [*sic*] male Hispanic run past him towards Ortiz when the attack began" and "Gonzalez identified [Duran] as the individual who ran past him towards his cousin who was being attacked"). As the State notes, during defendant's trial, defendant did not call a police officer to the stand to testify regarding what Gonzalez said at the police station on July 15, 2009.

¶ 87 On August 7, 2009, Gonzalez returned to the police station where he identified defendant in a lineup. He gave a signed, handwritten statement. Gonzalez stated that a group of five to seven men ran towards Ortiz. He could not get a good look at their faces, but stated that "he knew his cousin was on the ground getting kicked." He heard his cousin yelling out "Slim" or "Rey" which is Gonzalez's nickname. After he heard his cousin yell, "he saw a light skinned guy run past him on the sidewalk." He stated that "he [was] sure the guy ran past him after the beating had started, but he [was not] sure if the beating had ended." Gonzalez did not state whether defendant was running towards the beating scene or away from the beating scene.

¶ 88 In August 2009, Gonzalez testified before the grand jury. At trial, Gonzalez testified that he stated that defendant ran past him and towards Ortiz and the group was still around Ortiz who was on the ground. Gonzalez stated that, as his memory was at the time of trial, defendant was running away from Ortiz.

¶ 89 When asked at defendant's trial, if he had previously testified at Castillo's trial that defendant was running "towards the crowd," Gonzalez testified that he did "not remember."

¶ 90 There was an inconsistency in Gonzalez's testimony as to whether, at the time he saw defendant run past him, defendant was running towards the beating or away from the beating. However, "t]he mere fact of inconsistency does not constitute proof that trial testimony is false." *Lamon,* 346 Ill. App. 3d at 1094. Moreover, a mere inconsistency in testimony does not "support the charge that the prosecutor knew of perjured testimony but nevertheless willfully and intentionally used it." *Id*.; accord *People v. Craig*, 334 Ill. App. 3d 426, 439 (2002) ("inconsistencies in testimony cannot be equated with perjury, nor does it establish or show that the State knowingly used perjured testimony"); *People v. Amos*, 204 Ill. App. 3d 75, 85 (1990) (same).

¶ 91 There is no indication in the record that the State knowingly used perjured testimony to obtain a conviction. Defendant has failed to show that Gonzalez committed perjury as a result of his inconsistent statements regarding *when* defendant ran past him. We find no merit to defendant's argument that he was denied a fair trial or that the State obtained his conviction through perjured testimony.

¶ 92 CONCLUSION

¶ 93 In accordance with the foregoing, we affirm the judgment of the circuit court of Cook County.

¶ 94 Affirmed.