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SIXTH DIVISION
May 22, 2015

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 15591
)	
JESUS MENDOZA,)	The Honorable
)	Lawrence Edward Flood,
Defendant-Appellant.)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hoffman and Justice Rochford concurred in the judgment.

ORDER

¶1 *HELD:* The evidence was sufficient to support defendant's first degree murder conviction. The challenged hearsay statements were admissible as exceptions to demonstrate the course of the police investigation. The challenged remarks made by the State during closing argument were not improper and the remark that misstated the evidence was not a material factor in defendant's conviction. Defense counsel was not ineffective and there was no cumulative error. Defendant's mittimus must be corrected to accurately reflect his conviction for using a

firearm in the commission of the murder. We remand for clarification of the trial court's sentence consistent with the relevant statutes.

¶2 Following a jury trial, defendant, Jesus Mendoza, was convicted of first degree murder and found to have possessed a firearm during the offense. Defendant was sentenced to an aggregate of 65 years' imprisonment. On appeal, defendant contends: (1) the State failed to prove beyond a reasonable doubt that he shot the victim; (2) the State's improper use of hearsay evidence violated his right to confrontation and constituted reversible error; (3) the State made improper comments and misstated the evidence during closing argument resulting in reversible error; (4) his counsel was ineffective; (5) the cumulative errors that occurred deprived him of a fair trial; and (6) this cause should be remanded for resentencing. Based on the following, we affirm defendant's conviction and remand for clarification of defendant's sentence.

¶3 **FACTS**

¶4 At trial, Manuel Gamboa, Sr., testified that, on July 16, 2005, he drove his son, Manuel Gamboa, Jr., (Manny), to a friend's house. The next day, July 17, 2005, one of Manny's friends appeared at Manuel's house and reported that Manny had been shot. In response, Manuel and his wife, Manny's mother, proceeded to Christ Hospital where they found Manny on life support. Manuel and his wife remained at the hospital overnight. On the morning of July 18, 2005, Manny was removed from life support. Manuel testified that his wedding anniversary was July 18, and Manny was the couple's only child. At the time of trial, he and his wife had been married for 38 years. Manuel testified that Manny had been a student at Northwestern, but Manuel saw Manny every day in 2005.

¶15 Sergeant Mark Sedevic¹ testified that, at approximately 12:30 p.m. on July 17, 2005, he responded to a call in the vicinity of 72nd Street and Lawndale Avenue in Chicago, Illinois, which is a residential area. Sergeant Sedevic described the scene as "very chaotic" with many people crying and yelling. An ambulance was on the scene and Manny, the victim, was inside. According to Sergeant Sedevic, another officer had arrived on the scene earlier and spoke to the witnesses first. Sergeant Sedevic testified that he interviewed the witnesses listed on the general offense case report and later filed a supplemental report. After interviewing the witnesses, Sergio Mendoza was identified as one of two shooters. Sergeant Sedevic testified that one or more of the witnesses described Sergio as a 21-year-old Hispanic male, 5 foot, 10 inches tall, weighing 140 pounds with brown eyes, black hair, and an olive complexion. The second offender was described by one or more of the witnesses as over 6 feet tall weighing 280 pounds.

¶16 In response to the information provided on the scene by Melissa Moreno, he and his partner, Officer Peter Cruz, proceeded to 7227 South Avers, which was identified as Sergio's home. The house was a couple of blocks from the crime scene. Sergeant Sedevic testified that he spoke to Maria Mendoza, who lived at the location.

¶17 Melissa testified that, on July 17, 2005, she was 19 years old and lived at 7154 South Lawndale Avenue in Chicago, Illinois, with her brother, Mariano. Melissa said she and a group of friends, including Mariano, Manny, Roxana Ruiz, Maher Samad, and Amer Abuasi, Maher's cousin, planned to go to the beach that day. The plans had not been finalized, so the group intended to meet at Morenos' house first. At approximately noon, Melissa was driving on 71st Street by herself toward her house on 71st Street when she noticed a two-tone blue Astro van driving "behind [her] really really close like they wanted to hit [her] car." Melissa observed two males in the van. She recognized the passenger from the neighborhood as Sergio. As Melissa

¹ At the time in question, Sergeant Sedevic was an officer.

approached 72nd Street and Avers, she turned and the van proceeded straight. Melissa continued driving to her house and reported what had happened to Mariano. In response, Mariano, Manny, Maher, and Amer left in Maher's car. Melissa proceeded to Roxana's house to pick her up. Melissa and Roxana stopped to purchase supplies for a beach barbeque and then returned to Melissa's house. When she pulled her car up to her house, Melissa noticed that Mariano and his friends had returned. Maher's car was parked on the east side of Lawndale facing northbound. Melissa stopped her car in the middle of the 7100 block of Lawndale facing southbound. She and Roxana remained in her car while the group talked about their plans to go to the beach for about five minutes. Mariano, Manny, and Amer had exited Maher's car and were standing near the front end of Melissa's car, speaking through the driver's side window.

¶18 According to Melissa, the same blue van from earlier "swung the corner and stopped right in front of [her] vehicle." Melissa observed two males exit the van, one from the driver's seat and one from the passenger's seat. Melissa described the day as sunny and stated that nothing impeded her vision out of the front windshield of her car. Melissa identified defendant as the driver of the van and Sergio as the passenger. At the time, defendant and Sergio were wearing white gloves on both of their hands and were carrying black handguns. Defendant stood between the van and Melissa's vehicle. Defendant and Sergio then began shooting in the direction of Mariano and his friends. In response, Mariano, Manny, and Amer attempted to run away. Melissa approximated that defendant and Sergio fired their guns six or seven times. Melissa stated that she placed her car in reverse and backed up part way down the block before stopping. When the shooting ceased, defendant returned to the driver's seat of the van and Sergio returned to the passenger's seat. The van reversed southbound on Lawndale onto 72nd Street and fled eastbound.

¶9 Melissa testified that she drove her car back to where the shooting took place and exited. Melissa observed Manny lying on his back in the grass. In an attempt to locate a wound, Melissa rolled Manny's body over and discovered that he had been shot. Melissa observed blood on Manny's shirt and someone attempted CPR before the ambulance arrived.

¶10 Melissa testified that she remained on the scene to speak to the police. Melissa reported that she recognized Sergio from the neighborhood and knew where he lived. Melissa, however, did not tell the officers about the incident with the Astro van earlier in the day because she was scared "for [her] brother and [their] lives" and afraid that Mariano would get in trouble. Melissa then accompanied the police to Sergio's address, 7227 South Avers, which was three blocks from her house. Melissa recognized Sergio's car, a Marquis, parked at the address. Melissa testified that she went to the police station on the date of the shooting, and, after viewing a photographic array, she identified Sergio's picture as one of the shooters. On July 27, 2005, Melissa viewed a different photographic array, but she was unable to identify anyone. Melissa asked to view a lineup.

¶11 On July 2, 2009, Melissa viewed another photographic array, but was unable to identify the driver of the van. Melissa again requested to view a lineup. On August 7, 2009, Melissa viewed a lineup and identified defendant. Melissa testified that she identified defendant in the lineup as having shot Manny, and not because she had seen defendant's picture in prior photographic arrays. According to Melissa, she did not know defendant prior to the date in question. Melissa did not recall describing the driver of the Astro van as 6 feet 6 inches or 7 feet tall or weighing 280 or 300 pounds. Sometime in 2012, Melissa confirmed to the police that she almost was "rammed" by the van on the date in question. Melissa added that she did not know why Sergio would try to ram her car other than because of a confrontation he had with Melissa's

former boyfriend, Francisco Contreras. Melissa testified that the driver was about 6 feet tall, had a "stocky" build, was approximately 200 pounds, had dark hair, and had a goatee. Melissa identified people's exhibit number 15 as a pair of white gloves similar to those worn by defendant and Sergio during the shooting.

¶12 Mariano testified that he was 18 years old on the date in question. Around noon on July 17, 2005, he, Manny, Maher, and Amer arrived at Morenos' house near 71st Street and Lawndale Avenue to meet Melissa and her friend prior to going to the beach. Mariano and his friends waited for Melissa to arrive. When she did, Melissa was upset, explaining that Sergio tried to ram her with his car. The information disappointed Mariano, who was protective of his sister, because "men are not supposed to hit women." He and his three friends "took off" in Maher's car in an effort to locate Sergio. The boys drove around the area until they found a blue Chevy Astro van at a stop light near 71st Street and Hamlin. Mariano testified that he observed three people in the van, one of which was defendant. Defendant was seated in the driver's seat and Sergio, or Chiefer,² was in the passenger seat. Mariano described the third person, who was seated in the back, as weighing 200 to 300 pounds. Mariano knew Sergio from the neighborhood, having spoken to him one to five times and having seen him driving around. Mariano also stated that he had smoked marijuana with Sergio. Mariano testified that he exited Maher's car and approached Sergio on the passenger side of the van. Mariano confronted Sergio regarding the incident with Melissa. According to Mariano, Sergio "got upset, and he jumped out of the vehicle." The pair began to fist fight, during which Mariano used brass-knuckles. Mariano testified that the fight lasted approximately two to three minutes. Mariano then returned to Maher's car.

¶13 According to Mariano, Maher drove back to Morenos' house on the 7100 block of South Lawndale and parked his car. Approximately 10 minutes later, Melissa drove up in her car with

² At the time in question, Mariano only knew Sergio as Chiefer.

Roxana in the passenger seat. Mariano and Manny left Maher's car to speak to Melissa. While talking to Melissa and Roxana, the blue Chevy Astro van approached at a high rate of speed. Three individuals were in the van, including defendant who was driving and Sergio who was in the passenger seat. Mariano described the third individual seated in the back of the van as a heavy set Hispanic, weighing between 200 and 300 pounds. Mariano testified that defendant slammed on the car brakes and exited the vehicle. Defendant was wearing thick white gloves and was holding a .38 revolver. Sergio also exited the van, but from the passenger side. Sergio was also wearing thick white gloves and was holding a revolver. According to Mariano, Melissa reversed her car down the block as defendant and Sergio began to open fire in the direction of Mariano and Manny. Mariano testified that he grabbed Manny and ran as fast as they could in an attempt to take cover. After approximately ten to twelve total gunshots, the shooting ceased. Mariano testified that he ran back toward the van and observed defendant in the driver seat and Sergio in the passenger seat. Mariano stated that he ran toward the van to "make sure I got a good look on their face one more time before they left." Mariano testified that, after the van fled, he returned to Manny, who was lying face up on the grass. Manny looked "really pale." Mariano lifted Manny's body and observed blood seeping from his back.

¶14 Mariano further testified that, around 4:15 p.m. on the date of the shooting, he identified Sergio in a photographic array as the passenger in the Astro van. On July 27, 2005, Mariano viewed a photographic array, but he did not make an identification. Then, on July 1, 2009, Mariano viewed another photographic array during which he reported that photographs three and five could have been the offender. Mariano testified that he viewed a lineup on August 8, 2009, and identified defendant as the driver of the Astro van and one of the shooters.

¶15 Mariano added that he did not tell the police about the altercation between himself and Sergio until April 2012. Mariano said he did not report the altercation earlier "because murder is a more serious crime." Mariano explained, "I was young. I was scared at the time. And my main focus was just on the detectives helping them as best I [could to] solve this case." Mariano testified that he did not know defendant. Mariano denied calling Sergio "Jesus II," but acknowledged that he may have made such a statement to Detective Velma Guerrero. Mariano also denied telling the police that he had smoked marijuana with Sergio and defendant. Mariano testified that, prior to the altercation with Sergio, he questioned Sergio as to why he was "messaging" with Melissa and told Sergio to get out of the van to "settle it." Sergio called Melissa a "whore," which made Mariano angry. Mariano stated that he did not call the police after Melissa told him about the incident with the Astro van because he hoped to talk it out with Sergio. Mariano further testified that, when the Astro van returned to the area and he observed the driver with white gloves, he "thought there would be some kind of violence" because it was 90 degrees outside. Mariano said he noticed the gun in the driver's hand immediately upon his exit from the vehicle. Mariano could not recall the driver's height, weight, or clothing from the date in question. Mariano approximated that the shooting lasted approximately one minute, during which time he got a "good-long look" at the shooters. Mariano identified people's exhibit number 15 as a pair of white gloves similar to those worn by defendant and Sergio during the shooting.

¶16 Maher testified that he was 21 years old on July 17, 2005. Maher stated that, between 11:30 a.m. and noon on the date in question, he drove Mariano, Manny, and Amer to the Morenos' house to make plans to go to the beach with Melissa and Roxana. Maher remained in his car while Mariano spoke to Melissa. When Mariano returned to the car, all four boys left in

search for an Astro van. When they found the van, Maher stopped his car. Mariano and Manny exited and approached the two occupants of the van. Mariano approached one side of the van and Manny approached the other. Maher remained in his car about 50 or 60 feet away from the van.

¶17 Eventually, Mariano and Manny returned to Maher's car and he drove to the Morenos' house where he parked his car on the east side of the street. Maher observed Melissa drive up in the opposite direction and stop her car in the middle of the street. Mariano, Manny, and Amer began to exit Maher's car when he observed the Astro van turn the corner and stop nearly next to his car. The Astro van was facing Melissa's car. Maher watched as the driver exited the car wearing white gloves and carrying a handgun. The driver moved to the front bumper of his car and started shooting toward the group of boys, who were in the process of exiting Maher's car. Maher was asked to identify the driver in court. In response to the Assistant State's Attorney's (ASA) prompt to "speak louder," Maher said "I'm nervous. That one right there." Maher identified defendant. Maher testified that, when the shots were fired, he panicked and jumped into the passenger seat in an attempt to exit his car. Maher was able to jump from the passenger seat to the grass. When the shooting stopped, the van left, but Maher did not see the van leave because he was still "ducking." Mariano, Amer, and Maher all checked each other for wounds before they checked on Manny, who was lying in the grass next to a pole with blue lips. Maher could not recall whether there was a second shooter or whether a passenger exited the Astro van.

¶18 Maher stated that, on July 2, 2009, he viewed a photographic array and identified defendant as the shooter. On August 7, 2009, Maher viewed a lineup and made a positive identification of the driver of the Astro van and shooter. Maher testified that he did not inform the police about the incident that occurred prior to the shooting until he was asked about it in

2012. Maher reasoned that he was afraid Mariano would "go to jail for it." Maher clarified that he did not see the prior incident himself. According to Maher, Mariano initially intended to have a conversation with the occupants of the Astro van in order to defend Melissa, but a fist fight ensued. Maher identified people's exhibit number 15 as a pair of white gloves similar to those worn by defendant during the shooting.

¶19 Roxana testified that, on the date in question, she was in Melissa's car, which was stopped near the Morenos' house, when a blue Astro van came around the corner at a high rate of speed and stopped in front of the four boys they had been talking to. The van was facing Melissa's car and was a "few feet" away. The driver exited the van wearing white gloves and carrying a handgun. Roxana testified that she observed a passenger in the van, but once she saw the driver exit with a handgun she began to take cover in Melissa's car. The driver began shooting at the group of boys and Melissa began reversing her car slowly. Roxana recalled hearing four or five gunshots and described the gun as dark in color. Within seconds, the shooting ceased, at which time Roxana looked outside of Melissa's car and observed the driver return to the van. He reversed the van and fled the scene. Roxana testified that she slowly walked over to Manny, who was on the grass with blood. Roxana stated that she was not wearing her prescription eyeglasses during the incident. Roxana testified that she viewed a lineup on August 8, 2009, and narrowed the group of five individuals down to two potential suspects. Roxana admitted that she testified before the grand jury and stated that she saw the passenger emerge from the van with a handgun.

¶20 Detective Velma Guerrero testified that she was called to the scene of the shooting at approximately 12:30 p.m. on July 17, 2005. Detective Guerrero described the scene of the residential neighborhood as chaotic where the witnesses were "distracted and upset." When she

first arrived, Detective Guerrero learned that Melissa escorted some officers to 7227 South Avers to the home of the passenger in the offending vehicle. According to Detective Guerrero, Melissa knew the passenger drove a tan Marquis car and "had recently been arrested for a DUI." After Melissa returned to the scene, the witnesses were transported to the police station.

¶21 Detective Guerrero testified that she compiled a photographic array containing a photograph of Sergio while her colleagues interviewed the witnesses. Detective Guerrero administered the photographic array to Melissa, who identified Sergio as the passenger in the vehicle and shooter. The photographic array also was administered to Mariano, Maher, and Amer. Mariano positively identified Sergio as the passenger shooter. According to Detective Guerrero, she was in control of administering the photographic arrays, keeping "all the witnesses in the office. They [were] able to view the photo array independently without any other witnesses there. And once they view[ed] the photo array, they were removed and taken to another room where they [were] alone, away from all the other witnesses until they all view[ed] the photo array independently." Detective Guerrero generated an investigative alert for Sergio indicating that the police had probable cause to arrest him. As a result of the information gained through the witness interviews, the police were searching for a two-tone blue Astro van. Both Melissa and Mariano provided written statements and testified before a grand jury the following day.

¶22 Detective Guerrero testified that, on July 18, 2005, she went to Sergio's residence at 7227 South Avers and spoke to Maria Mendoza. Defense counsel objected on the grounds of hearsay and the trial court overruled the objection "only as course of investigation." The trial court admonished the jury that "you are only to consider this testimony for the course of the police investigation and that purpose only." Detective Guerrero testified that Maria identified herself as

Sergio's and defendant's sister. Maria informed the detective that "both her brothers [had been] missing" since the day before and that "she was worried." Maria also said that defendant drove a two-tone blue van. Detective Guerrero returned to the Mendoza residence on July 19, 2005, and observed a tan Marquis reportedly belonging to Sergio. Detective Guerrero discovered the car was registered to Jonathan Sanchez. Detective Guerrero had another conversation with Maria and learned that Sergio used the fictitious name Jonathan Sanchez for employment in the United States. According to Detective Guerrero, Maria escorted her to the unfinished basement where Sergio and defendant slept. While there, Detective Guerrero observed two beds, two tables, a television, a telephone, clothes, and shoes. She also found a check stub from Farmington Foods dated June 2004 that was made out to Adon Sanchez. Detective Guerrero learned that defendant "used the name Adon Sanchez." Detective Guerrero looked at the caller identification stored on the telephone in the basement and copied all of the names and phone numbers recorded on the device.

¶23 Detective Guerrero testified that she went to Farmington Foods, a meat packing company, on July 20, 2005. While there, Detective Guerrero observed several employees wearing thick white gloves similar to people's exhibit number 15. Detective Guerrero also learned that defendant worked at the company. One of the names retrieved from the caller identification at defendant's house was Faustino Castenada. Detective Guerrero contacted Castenada, who identified himself as defendant's coworker, but he did not have information regarding defendant's whereabouts.

¶24 On July 24, 2005, Detective Guerrero interviewed Roxana. Detective Guerrero explained that the witness had not been interviewed on the date in question because she was a minor at the time and the police were unable to obtain parental permission.

¶25 Detective Guerrero testified that the investigation continued on July 29, 2005, when she issued an investigative alert for defendant with no probable cause to arrest because he had not been identified as an offender at that point. Detective Guerrero said she obtained a photograph of defendant from 2002 that she used in photographic arrays administered to Mariano and Melissa. Neither identified defendant.

¶26 Through supplemental police reports, Detective Guerrero learned that defendant had a girlfriend in the area of 25th and Sacramento. Detective Guerrero stated that she and her partners drove all around that neighborhood in an attempt to locate the two-tone blue Astro van. On August 8, 2005, Detective Guerrero located a blue Astro van at 2528 South Francisco, in the "general area where [she] had been told it would be." She observed that the "windows on the front driver and passenger side weren't rolled all the way up. I noticed it was very dusty like it had not been moved, and it had been sitting there for awhile." The van was registered to Elizabeth Velez at the address of 7227 South Avers, which was defendant's address.

¶27 Detective Guerrero testified that, in May 2009, she received a photograph of defendant from another agency taken that year in Tennessee. According to Detective Guerrero, the photograph was used in a photographic array administered to Mariano on July 1, 2009. Mariano pointed to defendant's photograph, but "indicated *** he wasn't a hundred percent sure." Mariano narrowed it down to two people out of five in the photographic array. On July 2, 2009, Detective Guerrero received another photograph of defendant; this one was taken in September 2005 in Indiana, "around the same time period" as the shooting. Detective Guerrero used the 2005 photograph in arrays administered to Melissa and Maher. Melissa made "a tentative ID, meaning that she pointed at the photograph and said *** that she wasn't one hundred percent sure that was him." Melissa indicated that "if she were to see the person, this individual in

person, she would be more positive about her identification." For the array administered to Maher, the same photo of defendant was used but the order was altered "to keep the integrity of the investigation and the identification." Maher identified defendant as the driver of the two-tone blue Astro who exited the van wearing thick white gloves and firing a handgun. A warrant was issued for defendant's arrest. On July 24, 2009, defendant was arrested in Memphis, Tennessee.

¶28 Detective Guerrero transported defendant back to Chicago on August 7, 2009, and both Melissa and Maher viewed lineups that same night during which they separately identified defendant as the driver of the two-tone blue Astro van, who wore thick white gloves and fired a handgun. On the night of August 8, 2009, Mariano viewed a lineup and identified defendant as the driver of the two-tone Astro van, who wore thick white gloves and fired a weapon. Roxana viewed the lineup also on the night of August 8, 2009. According to Detective Guerrero, Roxana pointed to defendant "and said that looks like him. She wasn't sure." Defendant was allowed to choose his position for each of the lineups. Moreover, Detective Guerrero testified that each witness signed an advisory form prior to viewing the photographic arrays, which advised the witness that the suspect may or may not be in the photo spread; the witness was not required to make an identification; and the witness would not assume that the person administering the photo spread knew which person was the suspect.

¶29 Detective Guerrero testified that she re-interviewed witnesses in 2012. Detective Guerrero said she learned about the "ramming incident" through Amer. According to the detective, Melissa and Mariano were forthcoming in disclosing the incident when asked. Mariano explained that he did not tell the police earlier about the incident because "he didn't want to mess the case up." Mariano admitted that he beat Sergio and bloodied his face. Mariano referred to Sergio as "Jesus II just like his brother." Mariano told the detective that he had

smoked marijuana with Sergio and defendant on occasions. According to Detective Guerrero, the driver had been described by the witnesses as a male Hispanic between 21 and 26 years old with a dark shaved head and a light olive complexion. Detective Guerrero testified that she never learned the identity of the third individual seated in the back of the van on the date in question.

¶30 The parties stipulated that, if called, Elizabeth Velez would testify that she had known defendant for four years prior to the date in question and had children with him. On the date in question, Elizabeth was the registered owner of a 1992 two-tone blue Astro van bearing license plate number 6741670 at defendant's address, *i.e.*, 7227 South Avers. Elizabeth would testify that defendant had keys to the van and permission to drive the vehicle.

¶31 Juan Velaquez testified that he was defendant's supervisor at Farmington Foods in July 2005. Defendant worked in the boning department. Defendant began working at the company in 2002. According to Juan, there were 35 to 40 employees in the boning department who wore white cotton gloves with plastic gloves over them. Juan presented a pair of white cotton gloves in court (people's exhibit number 15) and testified that they were the same gloves that had been used in 2005. Melissa, Mariano, and Maher identified these gloves as similar to the gloves worn by defendant during the shooting. Juan further testified that, in June 2005, defendant requested vacation time beginning on July 18, 2005, and ending August 1, 2005. The vacation request was approved. According to Juan, defendant had taken vacation days in the past and always returned to work. However, defendant did not return to work after July 15, 2005.

¶32 Faustino Castaneda testified that he worked with defendant in the boning department at Farmington Foods in 2005. Faustino confirmed that the gloves presented by Juan looked like the gloves they sometimes wore in the boning department. Faustino, however, testified that the

employees also used thicker gloves. According to Faustino, defendant drove him to work in 2005, at first in a small car and "at the end" in a van. In July 2005, Faustino learned that defendant was taking a vacation. Defendant requested that he pick up defendant's paycheck. Faustino did so and brought it to his home. Faustino testified that someone retrieved the paycheck when he was not home. Faustino confirmed defendant did not return to work after his vacation.

¶33 The parties stipulated that, if called, the medical examiner, Mitra Kalekar, would testify that she performed Manny's autopsy. According to Kalekar, Manny died of a single gunshot wound wherein the bullet entered his back and lodged in his brain. Kalekar removed the bullet from Manny's body.

¶34 The parties additionally stipulated that, if called, Jennifer Ulber, a forensic scientist, would testify that the bullet recovered during Manny's autopsy was a .38 caliber bullet.

¶35 At the close of the State's case-in-chief, defense counsel moved for a directed verdict. The motion was denied.

¶36 Juan testified as a character witness for the defense. Juan stated that defendant consistently was present for work, always followed instructions, and never caused a problem. Juan opined that defendant was "a peaceable person." Juan admitted that he never spent time with defendant outside of work.

¶37 Prior to closing statements, the trial court, in relevant part, advised the jury:

"All right. Ladies and gentlemen, both sides have rested in the case, and you have heard all of the evidence in the case, but the trial has not ended.

At this time the attorneys would have the opportunity of making final arguments, first the State and then the Defense. Then the State will have a chance to respond to the Defense argument.

What the lawyers say during the arguments is not evidence and should not be considered by you as evidence.

If one of the attorneys makes a statement that is not based on the evidence or the reasonable inferences to be drawn from the evidence, you should disregard the statement. You are to rely upon your own recollection of the evidence."

¶38 During its closing statement, the State provided:

"Little did Manuel Gamboa know that as he stood outside his friend's house making plans to go to the beach on a hot summer day that it would be the last conversation he would ever have. Little did he know that he would never make it to the beach that day, that he would never make it home the next day to wish his parents a happy anniversary. Little did Manney [*sic*] know that he would never make it off the 7100 block of South Lawndale. Why? Because this defendant Jesus Mendoza wanted revenge.

Ladies and gentlemen, on July 17th of 2005 the defendant and his brother, Sergio, his partner in crime, his accomplice went to the 7100 block of South Lawndale in an ambush. He and his brother came to kill armed with white gloves and firearms and a get-away van, and you know that the reason that they did this is because of what happened earlier.

When Melissa was almost rammed by Sergio in that blue two-tone Astro Van, she went back and told her brother Mariano about it, and he got in Maher's

car with Manney [*sic*] and Am[e]r, and they went looking for Sergio in that two-tone van; and the defendant watched as his younger brother got beat with a pair of brass knuckles, and he wanted revenge.

And Melissa and Mariano and the others should they have told you about that before? Of course, they should have, but they were young and they were scared, and they didn't want Mariano to get into trouble; and at the end of the day Mariano was right when he testified. He had not committed murder. The defendant had and with his brother Sergio.

The defendant drove his blue two-tone Astro Van on to the block of Lawndale that afternoon. He parked or stopped his car in a way that blocked in Maher's car and Manney [*sic*] and Mariano, who were standing next to each other, and Am[e]r where they were standing by Melissa's car blocking in also Melissa and Roxana from being able to drive away; and he jumped out of the driver's side with the white gloves on and a firearm in his hand, and he began shooting, and his brother came out of the passenger side dressed the same way and doing the exact same thing with yet another handgun.

Before Mariano and Melissa and the others had a chance to react, they were both already firing. The group of girls and guys tried to scatter and duck and reverse, but the defendant was firing over and over again.

And you know that Mariano was probably his target because it was Mariano he had seen hit his brother with those brass knuckles, but that's why you can't respond to getting beat up by committing a murder because Mariano never even got hit. One bullet was all it took, one bullet in Manney's [*sic*] back ripping

through his body and lodging in his brain, and *** Manney [*sic*] *** never made it to the beach that day. He never made it out of Christ Hospital. He died on his parents' wedding anniversary."

¶39 Later, in reviewing the testimony of the witnesses to establish the elements of the offense of first degree murder, the State discussed Maher's testimony and identification of defendant. In particular, the State provided:

"And it's corroboration of the identification that [Maher] made in front of you in court, you saw him. He didn't want to identify the defendant. He was scared, and he told you that he was nervous to do it, to sit in a room with a murderer and point to him and say I saw him shoot Manney [*sic*], but he did, and it's corroboration of what all the other witnesses tell you."

¶40 In its rebuttal closing statement, the State argued that the incidents before the shooting were relevant to demonstrate identification and motive. In terms of identification, the State provided:

"*** [c]ounsel wants you to believe there was a fast shooting and that was it and they couldn't see who it was in the van shooting at them, but that's not true because Melissa had an opportunity prior to the shooting to see who was in the van and not only that to see the actual van.

Prior to the shooting, Manney [*sic*], Maher ***, and Mariano saw the same van that came screeching around the corner ten minutes later always with the defendant in the driver's seat, always with Sergio in the passenger seat. So that's why those two prior incidents had any importance because of identification, because it wasn't a one time deal on that day.

Some of those witnesses who testified during this trial saw the defendant and Sergio three times."

¶41 During the jury's deliberations, after having deliberated for approximately three hours, the jurors sent a note stating, "The jury would like to know the year the picture was taken from the following exhibits, People's Exhibit 33, Defense Exhibit 4, position 3, upper right, People's Exhibit 32." After securing the consent of both parties, the jury was instructed to continue deliberating. The jury returned a verdict finding defendant guilty of first degree murder and found the allegation proven that defendant was armed with a firearm during the commission of the offense. Defendant's motion for a new trial was denied by the trial court.

¶42 Defendant was sentenced to 50 years' imprisonment for first degree murder with a 15-year add on for the firearm enhancement. The trial court and the parties agreed on the record that defendant would serve 100 percent of his murder sentence and 85 percent of the 15-year firearm enhancement. On October 9, 2012, the trial court issued a "corrected mitt[imus]" to adjust defendant's credit for time served. The mittimus also provided that defendant was sentenced to 50 years' imprisonment on count I (intentional murder) to be served at 100% time consecutive to 15 years' imprisonment on count V (strong probability of murder) to be served at 85% time. This appeal followed.

¶43 ANALYSIS

¶44 I. Sufficiency of the Evidence

¶45 Defendant contends the State failed to prove his guilt beyond a reasonable doubt where the eyewitness identifications were unreliable, the identification procedures were impermissibly suggestive, and their testimony was not credible.

¶46 A challenge to the sufficiency of the evidence requires a reviewing court to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (Emphasis in the original.) *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). It is not the reviewing court's function to retry the defendant or substitute its judgment for that of the trier of fact. *People v. Evans*, 209 Ill. 2d 194, 209 (2004). Rather, it is for the trier of fact to assess the credibility of the witnesses, determine the appropriate weight of the testimony, and resolve conflicts or inconsistencies in the evidence. *People v. Williams*, 388 Ill. App. 3d 422, 429 (2009). In order to overturn a judgment, the evidence must be "so unsatisfactory, improbable or implausible" to raise a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶47 A defendant is guilty of first degree murder when the State proves beyond a reasonable doubt that, in performing acts which cause the death of an individual, he either intends to kill that individual or knows that such acts will cause death to that individual. 720 ILCS 5/9-1(a)(1) (West 2004).

¶48 Based on our review of the record, we conclude the evidence was sufficient to support defendant's conviction.³ Melissa, Mariano, and Maher testified that, after a prior interaction with defendant's brother earlier in the day, defendant approached the group at a high rate of speed driving the same two-tone blue Astro van from the prior interaction. The van was registered to defendant's girlfriend at the address they shared just three blocks away from the location of the shooting. Defendant had open access to the keys and permission to use the van. All three witnesses observed defendant stop the van facing Melissa's car in the middle of the street and

³ Defendant does not expressly challenge the jury's finding as to his personal discharge of a firearm in the commission of the offense.

exit wearing white gloves despite the 90 degree heat. It was midday and all three witnesses observed defendant holding a handgun, which he immediately began firing in the direction of the group of boys, who were assembled in and around Maher's parked car and Melissa's car. Within seconds, the shooting stopped and defendant returned to the van and fled. Roxana confirmed that a blue Astro van sped toward the group before stopping and that the driver emerged wearing white gloves and firing a gun. Mariano testified that defendant was armed with a .38 caliber revolver and the bullet removed from Manny during his autopsy was a .38 caliber. Defendant's boss, Juan, produced white gloves from Farmington Foods, where defendant worked, and testified that they were the same kind used at Farmington Foods at the time of the shooting. Melissa, Mariano, and Maher confirmed that the gloves produced by Juan were similar to the gloves they observed defendant wearing during the shooting. Juan additionally confirmed that defendant never returned to work after the date of the shooting.

¶49 Defendant argues that the identification testimony provided by Melissa, Mariano, and Maher could not support his conviction where the witnesses first identified him four years after the shooting under circumstances rendering the identifications unreliable. "A single witness' identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification." *Slim*, 127 Ill. 2d at 307. Identification testimony generally is assessed based on the factors presented in *Neil v. Biggers*, 409 U.S. 188 (1972), which include: (1) the opportunity the witness had to view the offender at the time of the crime; (2) the degree of attention given by the witness; (3) the accuracy of the witness' prior description of the offender; (4) the level of certainty the witness demonstrated when identifying the perpetrator in person; and (5) the amount of time that lapsed between the crime and the in-person identification. *Slim*, 127 Ill. 2d at 307-08.

¶50 Turning to the first identification factor, the evidence demonstrated that Melissa, Mariano, and Maher observed defendant exit the two-tone blue Astro van in the middle of a July day. The van was stopped directly in front of Melissa's car in the middle of the street. Testimony demonstrated that Melissa's car was next to Maher's car, which was parked at the curb facing the opposite direction. Melissa had an unobstructed view of defendant through the windshield of her car as he stood between the van and her car. Mariano also had an unobstructed view of defendant as Mariano stood next to Melissa's driver's side window. Maher additionally had an unobstructed view of defendant as Maher sat in the driver's seat of his car and defendant stood at the front bumper of the van. The witnesses took different forms of cover once defendant started shooting, but Mariano testified that he ran after defendant as he returned to the van and fled in order to get a "good-long look" at him. Although the entire incident lasted only approximately one minute according to Mariano, the brevity of a witness' identification does not undermine the identification testimony, but rather is a factor to consider in weighing the testimony. *People v. Petermon*, 2014 IL App (1st) 113536, ¶ 32 (citing *People v. Parks*, 50 Ill. App. 3d 929, 932-33 (1977) (where an incident lasting five to ten seconds was sufficient to support a conviction). In sum, the witnesses had sufficient opportunity to observe defendant at the time of the crime.

¶51 Turning to the second identification factor, the testimony clearly established that Melissa, Mariano, and Maher were focused on defendant during the shooting. All three witnesses testified that the two-tone blue Astro van sped onto the street, stopping directly in front of Melissa's car and next to Maher's car. All three witnesses observed defendant exit the van wearing white gloves despite the heat that day and carrying a handgun in one of his gloved hands. In fact, Mariano testified to seeing defendant's gloved hands even before he exited the

van. Melissa and Mariano testified that they also observed Sergio exit the van wearing white gloves and carrying a handgun, but both defendant and Sergio would have been within Melissa's and Mariano's field of view at the same time when they exited the van, thus not causing their attention to be distracted from defendant. Moreover, as stated, Mariano followed after the van after the shooting stopped to ensure he viewed defendant accurately. We find the witnesses' degree of attention to defendant at the time of the crime was sufficient.

¶52 Turning to the third identification factor, Detective Guerrero testified that the description he had of defendant after having interviewed the witnesses was of a male Hispanic between 21 and 26 years old with a shaved head and an olive complexion. While this description was "generic" as stated by defendant, the witnesses additionally described defendant as wearing white gloves and driving a two-tone blue Astro van. Moreover, "[a]s a general proposition, it can be said that discrepancies and omissions as to facial and other physical characteristics are not fatal, but simply affect the weight to be given the identification testimony." *Slim*, 127 Ill. 2d at 308. "It has consistently been held that a witness is not expected or required to distinguish individual and separate features of a suspect in making an identification. Instead, a witness' positive identification can be sufficient even though the witness gives only a general description based on the total impression the accused's appearance made." *Id.* at 309. We, therefore, find the accuracy of the witnesses' prior description was sufficient.

¶53 Turning to the fourth identification factor, there is nothing in the record to suggest the witnesses' identification confrontations were uncertain. On the contrary, Melissa and Mariano did not identify defendant until four years after the shooting despite having viewed a number of photographic arrays prior to that time. Their repeated inability to identify the suspect until the time he was presented during a lineup demonstrates the witnesses' certainty once they did

identify defendant as the shooter. With regard to Maher's courtroom identification, the record does not suggest it was uncertain. Rather, a review of Maher's entire testimony demonstrates that he repeatedly was reminded to keep his voice up and not to speak with his hand in front of his mouth. When he was asked to identify defendant in court, he seemingly hesitated before stating "I'm nervous. That one right there." The context of the remark and the rest of his testimony reveal Maher was unnerved while testifying, not that he was unsure defendant was the shooter. Defendant's argument that he was the only individual repeatedly shown in the identification procedures has repeatedly been rejected by Illinois courts. "Lineups are not rendered inadequate *** merely because the defendant is the only individual in the lineup who was also in the" photographic array. *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 17 (and cases cited therein). Moreover, Melissa expressly testified that she did not identify defendant in the lineup because she had previously seen his picture in photographic arrays. In fact, as highlighted by defendant, neither Melissa nor Mariano identified a 2002 photograph of defendant during the photographic array administered on July 27, 2005, ten days after the incident. As for Maher, he was not shown a photographic array until July 2009, when he positively identified defendant, and then he identified defendant again one month later during a lineup. In sum, we find the record demonstrates the witnesses were certain once they made their identifications of defendant.

¶54 Turning to the fifth, and final, identification factor, four years lapsed between the time of the shooting and the identification. This court, however, has clarified " '[t]he lapse of time goes only to the weight of the testimony, a question for the jury, and does not destroy the witness's credibility.' " *Austin*, 328 Ill. App. 3d 798, 805 (2002) (quoting *People v. Rodgers*, 53 Ill. 2d 207, 214 (1972)). This court has upheld an identification made after two years (*Rodgers*, 53 Ill.

2d at 214)), an identification made after one year and four months (*People v. Malone*, 2012 IL App (1st) 110517, ¶36), and an identification made in-court for the first time three years and nearly eight months after the offense (*Austin*, 328 Ill. App. 3d at 805). Moreover, the police officer's ability to obtain an identification was hampered by defendant's flight to Tennessee. We, therefore, find the lapse in time did not render the identifications incompetent.

¶55 Defendant also argues that the police identification procedures used were impermissibly suggestive. We disagree. Detective Guerrero testified each witness signed an advisory form prior to viewing the photographic arrays, which advised the witness that the suspect may or may not be in the photo spread; the witness was not required to make an identification; and the witness would not assume that the person administering the photo spread knew which person was the suspect. In addition, all the arrays and lineups were administered independently. Moreover, defendant presented no evidence that the witnesses conferred prior to or after making their identifications.

¶56 However, even assuming, *arguendo*, the identification procedures were impermissibly suggestive, as argued by defendant, based on the totality of the circumstances surrounding the witnesses' identifications of defendant, we find there was sufficient evidence to demonstrate Melissa, Mariano, and Maher identified defendant based on their own independent recollections. See *People v. Littleton*, 2014 IL App (1st) 121950, ¶ 84 ("While it is the defendant's burden to establish that the pretrial confrontation was impermissibly suggestive [citation], once accomplished, the State may nevertheless overcome that obstacle, by a clear and convincing showing, based on the totality of the surrounding circumstances, that the witness is identifying the defendant solely on the basis of his memory of events at the time of the crime." (Internal quotation marks omitted.)); *Daniel*, 2014 IL App (1st) 121171, ¶ 21. As stated, for whatever

reason, Melissa and Mariano failed to identify a 2002 photograph of defendant during the array administered 10 days after the shooting. Nevertheless, their inability to identify defendant in the 2002 photograph does not discredit their later identification during the lineup. "[A]s a matter of law, a victim's or witness' inability to identify a defendant subsequent to, even soon after, the commission of the offense charged does not render incompetent and inadmissible his identification of the defendant at a later lineup or even later trial." *People v. Maloney*, 201 Ill. App. 3d 599, 609 (1990).

¶57 We need not address defendant's argument that the photograph obtained by Detective Guerrero in May 2009 from another agency was not, in fact, a photograph of defendant. Whether the photograph was defendant or not is of no consequence as no witness identified the person in the photograph as the shooter. Mariano merely identified the person in the photograph as one of two potential offenders out of the five in the array.

¶58 Defendant further argues that the witnesses were not credible. In particular, defendant attacks the witnesses' credibility based on their failure to inform the police about Mariano's confrontation with Sergio after Melissa's car had almost been hit by the two-tone blue Astro van. In addition, defendant asserts that the witnesses were biased against defendant based on Sergio having alluded police capture and their knowledge that defendant was Sergio's brother. Further, defendant argues Mariano was impeached, Maher was equivocal in his testimony, and Roxana never positively identified him prior to trial. All of these issues, however, were matters to be decided by the jury. As stated, the credibility of the witnesses, the weight to be given their testimony, and the resolution of any conflicts in the evidence was within the province of the jury and a reviewing court will not substitute its judgment for the jury on these matters. See *Williams*, 388 Ill. App. 3d at 429 (2009).

¶59 In sum, the evidence was not "so unsatisfactory, improbable or implausible" to raise a reasonable doubt as to defendant's guilt. *Slim*, 127 Ill. 2d at 307.

¶60

II. Hearsay

¶61 Defendant next contends the State improperly introduced a number of hearsay statements. Defendant recognizes that, of the five challenged statements, he did not preserve four of them for our review. Defendant, however, requests that we review the unpreserved statements under the doctrine of plain error. The State responds that the admission of the challenged statements did not constitute error where the statements qualified as exceptions to the hearsay rule.

¶62 To preserve an issue for review, a defendant must contemporaneously object at trial and raise the alleged error in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Under the narrow and limited plain error exception to the general forfeiture rule, a reviewing court may consider forfeited errors where the evidence was closely balanced or where the error was so egregious that the defendant was deprived of a substantial right and thus a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). To invoke the plain error doctrine, a defendant first must show there was a clear or obvious error. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

¶63 Hearsay is an out-of-court statement offered to prove the truth of the matter asserted and generally is inadmissible at trial unless it falls within an exception to the rule. *People v. Temple*, 2014 IL App (1st) 111653, ¶ 58. One such exception exists where the statement is offered "for the limited purpose of showing the course of a police investigation where such testimony is necessary to fully explain the State's case to the trier of fact." *People v. Williams*, 181 Ill. 2d 297, 313 (1998); *People v. Pulliam*, 176 Ill. 2d 261, 274 (1997). A trial court's ruling on the admissibility of evidence will be reversed only where the court abused its discretion. *Temple*, 2014 IL App (1st) 111653, ¶ 58.

¶64 Defendant challenges the admission of the following five statements made during Detective Guerrero's testimony: (1) Melissa "had knowledge that [Sergio] had recently been arrested for a DUI"; (2) Maria Mendoza said she was the sister of Sergio and defendant; (3) Maria stated that "both her brothers were missing [since the day of the shooting] and she was worried"; (4) Guerrero learned that defendant "used the name Adon Sanchez"; and (5) Guerrero learned through reports that defendant had a girlfriend in the area of 25th and Sacramento.

¶65 Based on our review of the record, we find the statements were admissible as hearsay exceptions in order to help explain the police investigation. In response to defendant's only objection, the trial court found Detective Guerrero's testimony regarding her conversation with Maria was admissible to explain the police investigation and the jury was admonished "only to consider this testimony for the course of the police investigation and that purpose only." It is presumed that the jury will follow the court's instructions. *People v. Simms*, 143 Ill. 2d 154, 174 (1991). Moreover, none of the statements were used to prove the truth of the matters asserted. Rather, the statements were used to explain the course of Detective Guerrero's investigation, namely, to fully explain the import of Melissa's assistance in bringing officers to Sergio's address, an individual with whom she was familiar; to explain why Detective Guerrero returned to the 7227 South Avers address on multiple occasions and what she learned while searching the house with Maria's permission; to explain why Detective Guerrero investigated Farmington Foods and what she learned while there; and to explain how she came to find the two-tone blue Astro van matching the description of the van used during the shooting. See *Pulliam*, 176 Ill. 2d at 174; *Simms*, 143 Ill. 2d at 174.

¶66 Because we have found no error in the admission of the challenged statements, we need not determine whether the admission of the preserved statement was harmless error or whether

the admission of the unpreserved statements was plain error. Additionally, because we have found no error in the admission of the challenged statements, defendant cannot sustain an ineffective assistance of counsel claim based on counsel's failure to challenge the admission thereof.

¶67

III. Improper Closing Statements

¶68 Defendant contends the State made improper comments and misstated the evidence during closing statements, thereby depriving him of a fair trial. Defendant concedes that he failed to preserve the alleged errors; however, he requests that we review the errors under the doctrine of plain error. The State responds that the challenged remarks were not erroneous.

¶69 As previously stated, a defendant must contemporaneously object at trial and raise the alleged error in a posttrial motion to preserve an issue for appellate review. *Enoch*, 122 Ill. 2d at 186. Under the narrow and limited plain error exception, we may consider forfeited errors where the evidence was closely balanced or where the error was so egregious that the defendant was deprived of a substantial right and thus a fair trial. *Herron*, 215 Ill. 2d at 178-79. To invoke the plain error doctrine, a defendant first must show there was a clear or obvious error. *Hillier*, 237 Ill. 2d at 545.

¶70 The supreme court consistently has held that prosecutors are allowed a great deal of latitude during closing argument and may comment upon and draw reasonable inferences from the evidence presented during trial even if such inferences are unfavorable to the defendant. *People v. Hudson*, 157 Ill. 2d 401, 441 (1993). The State also may respond to comments made by defense counsel which clearly invite a response. *Id.* The State, however, must refrain from making improper, prejudicial arguments or comments. *Id.* A prosecutor's improper closing remarks will warrant a new trial if the remarks were a material factor in the conviction. *People*

v. Linscott, 142 Ill. 2d 22, 28 (1991). The question before us is whether the jury could have reached a contrary verdict had the improper remarks not been made. *Id.*

¶71 We note the parties disagree about the proper standard of review. We recognize that there appears to be a conflict among supreme court cases regarding the appropriate standard for reviewing remarks made during closing argument. Compare *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007) (employing a *de novo* standard) and *Hudson*, 157 Ill. 2d at 441 (employing an abuse of discretion standard). We need not resolve the issue of the appropriate standard of review at this time because defendant's contention fails under either standard. See *People v. Johnson*, 385 Ill. App. 3d 585, 603 (2008).

¶72 Defendant takes issue with four remarks made by the State during closing argument. Defendant first challenges the following:

"Little did Manuel Gamboa know that as he stood outside his friend's house making plans to go to the beach on a hot summer day that it would be the last conversation he would ever have. Little did he know that he would never make it to the beach that day, that he would never make it home the next day to wish his parents a happy anniversary."

Defendant additionally challenges the State's follow-up comment on the same topic, committed "a minute or two later" wherein the prosecutor said Manny "never made it to the beach that day. He never made it out of Christ Hospital. He died on his parents' wedding anniversary."

Defendant argues that these remarks were prejudicial because they served no purpose but to inflame the jury's sympathy for the victim and his parents. The State responds that the brief remarks were incidental.

¶73 While evidence concerning a decedent's family presented in a series of statements and questions in such a method as to permit the jury to believe it material has been found to be prejudicial, we find the references in the State's closing argument in this case do not constitute error. See *People v. Hope*, 116 Ill. 2d 265, 277-78 (1986) ("the holding reached in each case dealing with reference to a murder victim's family will depend upon how such reference comes about"). Notably, defendant does not challenge the State's examination of Manuel Gamboa, Sr. Defendant takes issue only with the State's closing remarks based on his testimony. "Common sense tells us that murder victims do not live in a vacuum and that, in most cases, they leave behind family members." *People v. Free*, 94 Ill. 2d 378, 415 (1983). We find the challenged remarks made by the State, which were isolated to the beginning of a lengthy closing argument that reviewed all of the evidence presented at trial along with the elements of the offense charged, were incidental and not material. Cf. *Hope*, 116 Ill. 2d at 278 (the defendant was prejudiced where the jury heard testimony and saw pictures of the decedent's family not only from the widow, but from another witness, in addition to remarks made by the State during opening statement and closing argument the materiality of which was established when defense counsel's related objections were overruled); *People v. Bernette*, 30 Ill. 2d 359, 371 (1964). We, therefore, conclude defendant was not denied a fair trial as a result of the challenged comments.

¶74 Defendant next argues that the State improperly trivialized the State's witnesses' criminal conduct by stating:

"And Melissa and Mariano and the others should they have told you about that before? Of course, they should have, but they were young and they were scared, and they didn't want Mariano to get into trouble; and at the end of the day

Mariano was right when he testified. He had not committed murder. The defendant had and with his brother Sergio."

The record, however, reveals that, later in the State's rebuttal closing argument, the prosecutor provided:

"Okay. Let's get something straight right away so we can stop talking about it. The kids should have told about the incident where Melissa's van almost got rammed.

No one is going to sit here and tell you that it was okay that the kids didn't say anything about the car almost being rammed, and no one certainly is going to stand here and tell you that they shouldn't have said anything about the prior fight with Sergio."

Simply stated, the prosecutor's comments, especially in light of the remarks made in the rebuttal closing argument, did not constitute prejudicial error.

¶75 Defendant additionally takes issue with the State's closing remark regarding Maher's hesitation before making an in-court identification of defendant. Specifically, defendant challenges the following: "You saw [Maher]. He didn't want to identify the defendant. He was scared, and he told you he was nervous to do it, to sit in a room with a murderer and point to him and say I saw him shoot Mann[y], but he did." Defendant argues the remark was prejudicial and not based on the facts in the record. Taking the remark in context, as we must (*People v. Logan*, 352 Ill. App. 3d 73, 81 (2004)), we conclude it did not constitute prejudicial error. The prosecutor was permitted to comment upon and draw reasonable inferences from the evidence presented, which included Maher's hesitation to identify defendant and his testimony that he was

"nervous." See *Hudson*, 157 Ill. 2d at 441. The remark was made while reviewing Maher's numerous identifications of defendant as the shooter.

¶76 Defendant finally argues that the State misstated the evidence during closing argument. In particular, defendant challenges remarks made by the State during rebuttal closing argument, in which the prosecutor said the incidents that took place before the shooting were relevant to demonstrate identification and motive. In terms of identification, the State provided:

**** [c]ounsel wants you to believe there was a fast shooting and that was it and they couldn't see who it was in the van shooting at them, but that's not true because Melissa had an opportunity prior to the shooting to see who was in the van and not only that to see the actual van.

Prior to the shooting, Manney [*sic*], Maher ***, and Mariano saw the same van that came screeching around the corner ten minutes later always with the defendant in the driver's seat, always with Sergio in the passenger seat. So that's why those two prior incidents had any importance because of identification, because it wasn't a one time deal on that day.

Some of those witnesses who testified during this trial saw the defendant and Sergio three times."

Defendant argues that the incidents that occurred prior to the shooting were admissible only for purposes of demonstrating motive and that the prosecutor misstated the evidence in terms of the number of times any of the witnesses observed defendant on the date in question.

¶77 With regard to defendant's brief first argument, we find the prosecutor's remarks were not improper in light of the testimony presented and were invited by the defense where defense counsel argued the witnesses only had a short time to view defendant

during the shooting. See *People v. Willis*, 409 Ill. App. 3d 804, 812-13 (2011) (remarks made during closing arguments must be examined in the context of those made by both the defense and the prosecution, and must be based upon the evidence presented or reasonable inferences drawn therefrom). With regard to defendant's second argument, we find the prosecutor did misstate the evidence. The State concedes the prosecutor's remarks that some of the witnesses saw defendant and Sergio three times was "slightly inaccurate." The evidence demonstrated that there were three incidents on the date in question: (1) the ramming incident wherein Melissa observed two males in the two-tone blue Astro van and identified Sergio as the passenger; (2) the confrontation between Mariano and Sergio wherein Maher saw a driver and passenger in the van and Mariano observed defendant in the driver's seat and Sergio in the passenger's seat; and (3) the shooting wherein Melissa, Mariano, and Maher witnessed defendant shoot Manny. As a result, none of the witnesses observed defendant three separate times on the date in question. However, where the jury heard the accurate testimony, we find the jurors were not seriously misled by the State's fleeting remark. See, generally, *People v. Edgeston*, 157 Ill 2d 201, 218-220 (1993) (finding no due process violation where the jury heard evidence both in support of and to discredit the State's argument, thus the jury was not misled or improperly influenced by the argument).

¶78 Moreover, the trial court corrected the State's inaccurate remark by issuing jury instructions that advised the jurors:

"What the lawyers say during the arguments is not evidence and should not be considered by you as evidence.

If one of the attorneys makes a statement that is not based on the evidence or the reasonable inferences to be drawn from the evidence, you should disregard the statement. You are to rely upon your own recollection of the evidence."

Therefore, to the extent error occurred, the prejudicial impact was cured by the trial court's admonishments. *People v. Ceja*, 204 Ill. 2d 332, 357-58 (2003) (comments overstating the evidence did not deny defendant a fair trial where the comments were brief and where the trial court instructed the jury to ignore statements made in closing argument that were not based on the evidence).

¶79 In sum, we find the State's closing arguments were proper. To the extent the prosecutor overstated the number of times defendant was observed by any of the witnesses, the remark did not result in substantial prejudice to defendant and did not constitute a material factor in his conviction without which the jury's verdict might have been different. *Willis*, 409 Ill. App. 3d at 813. With regard to defendant's alternative argument, namely, that counsel was ineffective for failing to challenge the State's closing remarks, we address that contention in the next section.

¶80 IV. Ineffective Assistance of Counsel

¶81 Defendant next contends he is entitled to a new trial where he received ineffective assistance of counsel.

¶82 To present a claim for ineffective assistance of counsel, a defendant must show both that: (1) counsel's representation was so deficient as to fall below an objective standard of reasonableness under prevailing professional norms; and (2) there is a reasonable probability that, but for counsel's errors, the results of trial would have been different. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). A reasonable probability is defined as a probability sufficient to undermine confidence in the outcome, *i.e.*, that the defense counsel's deficient

performance rendered the result unreliable or the proceeding fundamentally unfair. *Id.* at 694. A defendant must satisfy both prongs of the *Strickland* test to establish ineffective assistance.

People v. Albanese, 104 Ill. 2d 504, 525 (1984). A reviewing court need not consider whether counsel's performance was deficient before determining whether the defendant demonstrated such prejudice that he is entitled to a new trial as a result of the alleged deficiencies. *People v. Perry*, 224 Ill. 2d 312, 342 (2007).

¶83 Defendant argues that counsel erred in failing to challenge the State's previously discussed closing remarks, failing to challenge the foundation of people's exhibit number 32, which was a photograph allegedly depicting someone other than defendant, and failing to admit evidence demonstrating his status as an illegal alien. Defendant argues that he suffered resulting prejudice with regard to the photograph where it created the "illusion" that Mariano picked defendant out of a photographic array when he actually picked someone else and it created the impression that defendant dramatically changed his appearance between 2005 and 2009 consistent with an attempt to evade capture. Defendant argues that he suffered resulting prejudice with regard to his immigration status where counsel failed to apprise the jury of the information despite the jury having learned that he had an alias, thereby making him appear like a career criminal.

¶84 We conclude that, even assuming his counsel's performance was deficient, defendant has failed to establish resulting prejudice. Defendant cannot demonstrate that, but for counsel's failure to object to the State's mischaracterization of the number of times each witnesses observed defendant, failure to challenge the foundation of the photograph used in the array in which Mariano narrowed down the suspects to two out of five photographs, and failure to present his immigration status, the result of trial would have been different. The trial evidence

established that, around noon on the date in question, three witnesses observed defendant speed around a corner and stop his two-tone blue Astro van directly in front of and facing Melissa's car and next to Maher's car. This is the same van that almost "rammed" Melissa earlier and the same van from which Sergio emerged prior to engaging in a fist fight with Mariano while defendant remained in the driver's seat. Defendant and Sergio immediately exited the van wearing white gloves despite the 90 degree heat on the summer day and carrying handguns. Defendant and Sergio shot in the direction of the boys gathered around Melissa's and Maher's cars, killing Manny. Defendant and Sergio then returned to the van and fled. Melissa, Mariano, and Maher all identified the white gloves presented by Juan, defendant's coworker, as similar to those worn by defendant during the shooting. Juan testified that the gloves were used by the employees at Farmington Foods. Roxana corroborated that the shooter approached in a blue van wearing white gloves and carrying a handgun. Detective Guerrero's investigation led to the recovery of a blue-two tone Astro van that appeared to have been abandoned for some time. According to Juan's testimony, defendant never returned to work after the date in question. Defendant was apprehended in Tennessee four years after the shooting. In sum, the professed errors did not threaten the trial results. We, therefore, find defendant cannot establish a claim for ineffective assistance of counsel.

¶185

V. Cumulative Error

¶186 Defendant argues that the cumulative effect of the errors committed during his trial deprived him of a fair trial. Defendant concedes that he failed to preserve this issue and requests that we apply the doctrine of plain error.

¶187 "Where the alleged errors do not amount to reversible error on any individual issue, there generally is no cumulative error." *People v. Moore*, 358 Ill. App. 3d 683, 695 (2005). We find no cumulative error here.

¶188 VI. Error with the Corrected Mittimus

¶189 Defendant finally contends his current "corrected" mittimus is void. Defendant requests that we remand for resentencing consistent with the trial court's oral pronouncement.

¶190 The trial court sentenced defendant to 50 years' imprisonment for first degree murder plus a 15-year firearm enhancement for the use of a firearm in the commission of the murder. The trial court announced that the "50 years of incarceration [for murder was to be served] at 100 percent" and the 15-year enhancement "is to be served at 85 percent." During a hearing on defendant's motion to reconsider his sentence, defense counsel made an oral request for additional credit for time served. The trial court denied the motion to reconsider the sentence, but granted defendant's request for an additional 365 days credit for time served. The "corrected" mittimus issued on October 9, 2012, reflected that defendant was sentenced to 15 years for a second count of first-degree murder and not for a firearm enhancement. The State agrees that the mittimus must be corrected again to reflect the sentence actually imposed by the trial court.

¶191 Defendant, however, argues that this cause should be remanded for resentencing where the trial court imposed a void sentence by ordering that he would serve 100 percent of his 50-year murder sentence and 85 percent of his 15-year firearm enhancement. See 730 ILCS 5/5-8-1(a)(1)(d)(i) (West 2004) (providing that when the defendant commits first degree murder "while armed with a firearm, 15 years shall be added to the term of imprisonment imposed by the court"); 730 ILCS 5/3-6-3(a)(2)(i) (West 2004) (providing that a prisoner serving a term for first

degree murder "shall receive no good conduct credit"). The State responds that defendant invited the error and the sentence imposed is not void because truth in sentencing provisions do not affect the sentencing range imposed, but only the manner in which the sentence is carried out.

¶92 We agree that the sentence is not void *per se* because the terms of imprisonment were within the statutory guidelines. However, we remand the cause to the trial court to clarify the sentence imposed consistent with the relevant statutes.

¶93 CONCLUSION

¶94 We affirm defendant's conviction and remand with instructions to clarify the sentence and amend the mittimus consistent with the sentence imposed and the relevant statutes.

¶95 Affirmed; remanded with instructions.