

FIRST DIVISION
JUNE 29, 2015

No. 1-12-3282

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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. 08 CR 21480
)	
LAMAR ANDERSON,)	Honorable
)	Joseph G. Kazmierski, Jr.
Defendant-Appellant.)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Harris concurred in the judgment.

ORDER

- ¶ 1 *Held:* Trial court did not err in limiting defense counsel's cross-examination of a State witness; plain error doctrine does not apply to reach the forfeited issue of whether the trial court applied the wrong legal standard in finding defendant guilty, where defendant has not established that an error occurred at all; trial court properly imposed two mandatory firearm-enhancement sentences on defendant's first-degree murder and attempted murder convictions.
- ¶ 2 Following a bench trial in the circuit court of Cook County, defendant Lamar Anderson was convicted of first-degree murder, attempted murder, and aggravated battery with a firearm. Subsequently, he was sentenced to 50 years of imprisonment for first-degree murder; 35 years of

imprisonment for attempted murder; and 15 years of imprisonment for aggravated battery with a firearm. The 50-year sentence for first-degree murder was to run consecutively to the concurrent sentences for attempted murder and aggravated battery with a firearm. On direct appeal, the defendant argues that: (1) the trial court violated his right to confrontation by not allowing defense counsel to impeach a State witness with a prior statement; (2) the trial court applied the wrong legal standard in finding him guilty of the charged offenses; and (3) the trial court's imposition of two add-on sentences for the use of a firearm was unconstitutional. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 On October 8, 2008, a drive-by shooting occurred on the 4800 block of Polk Street in Chicago, Illinois, which resulted in the death of Tyrice Griggs (Tyrice) and injury to Tatianna Moses (Tatianna) and Roxanne Gist (Roxanne). In November 2008, the defendant was charged with first-degree murder, attempted murder, aggravated battery with a firearm, and unlawful use of a weapon by a felon. Subsequently, the State proceeded against the defendant on the charges of first-degree murder of Tyrice, attempted murder of Tatianna, and aggravated battery with a firearm of Roxanne.

¶ 5 On July 24, 2012, a bench trial commenced during which several witnesses testified. Dominique King (Dominique) testified on behalf of the State that on the evening of July 31, 2008, she was standing in the area of Congress Parkway and Kilbourn Avenue with Tatianna and Tatianna's brother, Jacquez,¹ when a green van pulled up. The defendant exited the green van and started arguing with Jacquez and Tatianna. The defendant then reentered the green van and drove away. Dominique, Tatianna, and Jacquez remained in the area for about 30 minutes to an

¹ The spelling of his name varies in the record.

hour before relocating to Jackson Boulevard and Kilbourn Avenue, where the green van reappeared and the defendant and Tatianna began arguing again. The defendant told Tatianna that he was going to "shoot her in her face when he sees her again," after which they continued to argue and the defendant eventually left in the green van. On October 8, 2008, at about 11:30 p.m., Dominique was in a white truck with Tatianna, Kiawana Burken (Kiawana), Jeremie George (Jeremie),² and her mother, Roxanne, on the 4800 block of Polk Street. Roxanne was in the driver's seat, Tatianna was in the front passenger seat, Kiawana and Jeremie sat in the middle row, and Dominique sat in the third row of seats. Once stopped, Jeremie exited the vehicle to speak with some people on the street and Dominique moved up to the passenger-side seat in the second row behind Tatianna. After a few minutes, Dominique heard gunshots coming from the back of their vehicle. She looked back, saw a dark SUV behind their white truck, and ducked down. When the gunshots stopped, Dominique looked back up and saw the dark SUV coming towards her. The driver's side of the dark SUV was closest to the passenger side of the white truck. She then saw a gun at the window of the backseat on the driver's side of the dark SUV, heard more gunshots, and ducked down again. When Dominique heard her mother, Roxanne, yell that she had been shot, Dominique exited the white truck and called the police. Dominique saw blood on Roxanne's stomach. She testified that no one in the white truck had a weapon prior to the shooting. On cross-examination, in response to defense counsel's questioning, she stated that she did not know whether a "Jeep" had driven by two or three times while they were sitting in the white truck or whether any of her companions had mentioned seeing a Jeep. Dominique denied that she and the others in the white truck had been smoking or drinking prior to the shooting.

² Jeremie is also known by the alias "Arkese Newton."

¶ 6 Roxanne testified that at about 11:30 p.m. on October 8, 2008, she was driving her vehicle with Dominique, Tatianna, Kiawana, and Jeremie as passengers in the 4800 block of Polk Street. After dropping Jeremie off, she heard gunshots, looked back, and felt a burning sensation in her stomach. Roxanne realized she had been shot, exited her vehicle, and was later taken by ambulance to a nearby hospital. On cross-examination, she testified that her vehicle was parked for about five minutes before the gunshots rang out; that Tatianna was speaking to someone who was standing outside of her vehicle during those five minutes; that the gunshots sounded like they were coming from behind her vehicle; and that she did not notice any vehicle repeatedly drive by prior to the shooting; and that she did not see a gun that night.

¶ 7 Tatianna testified that in the evening on July 31, 2008, she, Dominique, and the defendant's ex-girlfriend, "Muff," were sitting in a vehicle in the area of Congress Parkway and Kilbourn Avenue, when the defendant drove up in a green van. The green van, containing a total of eight passengers, pulled up alongside Tatianna's vehicle. The defendant and Muff then began a conversation, in which the defendant said he would "get out and beat somebody up" and Muff tried to dissuade him. The defendant also told the other men in the green van that he did not like Tatianna because she had a "big mouth." The defendant then looked in the direction of Jacquez, who was standing about 15 feet outside of Tatianna's vehicle, pulled over the green van, and exited the van with the other passengers. When the defendant and his companions surrounded Jacquez, Tatianna jumped out of her vehicle and ran in front of Jacquez. The defendant then told Tatianna that he was going to shoot her in the face and they argued for about five minutes before he and his companions reentered the green van and drove away. About 30 minutes later, Tatianna and her group drove to the area of Jackson Boulevard and Kilbourn Avenue, where they again encountered the defendant and his group. The defendant exited the green van and said he

wanted to fight Tatianna. However, the two did not engage in a physical altercation. Between July 31, 2008 and October 8, 2008, Tatianna saw the defendant "a couple [of] times." On October 8, 2008, at about 11:30 p.m., she, Dominique, Roxanne, Kiawana and Jeremie were standing outside of Roxanne's white truck at Jackson Boulevard and Kilbourn Avenue when she observed a maroon SUV—a Jeep—driving in the area. The maroon SUV headed down Jackson Boulevard, turned right onto Kostner Avenue, came around the block, reappeared on Kilbourn Avenue, and then turned left onto Jackson Avenue. The front windows of the maroon SUV was lightly tinted, while the back windows had a dark tint. Tatianna was unable to see who was inside the maroon SUV. Tatianna and her group then got into Roxanne's vehicle and drove to the 4800 block of Polk Street, where Jeremie asked Roxanne to pull over. She explained that she sat in the front passenger seat, Roxanne sat in the driver's seat, Jeremie sat behind the driver's seat, Dominique sat behind the front passenger seat, and Kiawana sat in the third row of the vehicle. The driver's side of Roxanne's vehicle was closest to the curb, while Tatianna's front passenger seat was next to the street. After Roxanne stopped her vehicle, Jeremie exited to speak with some people on the street, including the victim, Tyrice. Meanwhile, Tatianna, while still seated in Roxanne's vehicle, attempted to speak to "Heavy D" who was on the sidewalk by calling him over to the vehicle. When Heavy D came to the vehicle, Tatianna heard tires screeching and gunshots from behind the vehicle, looked behind her out of a window, and saw the same maroon SUV that she had observed earlier that evening. The maroon SUV headed towards her and she saw someone firing a gun out of the back driver's side window. As the maroon SUV pulled up alongside Roxanne's vehicle, Tatianna heard more gunshots, saw the defendant holding a gun out of the open rear driver's side window, and saw the gun discharge. Tatianna estimated the maroon SUV to be about six or seven feet away as it slowly passed

Roxanne's vehicle and she made eye contact with the defendant. The defendant continued to shoot at Roxanne's vehicle and continued to look in Tatianna's direction until the maroon SUV turned right onto Lavergne Avenue. The glass in Tatianna's window shattered and injured her face. After the defendant left the scene, Tatianna exited the vehicle and noticed Tyrice lying on the ground. Jeremie was standing next to Tyrice at the time of the shooting. Tatianna then tried to enter Heavy D's house but it was locked. Instead, she sought help from a woman at another house, and the woman gave Tatianna a towel to wipe her face and informed Tatianna that she had been shot in the right upper thigh. Thereafter, the police and an ambulance arrived to transport Tatianna to the hospital. During her testimony, Tatianna was shown photographs of the vehicle she was sitting in at the time of the shooting, and she described the damage to the window of the passenger seat as a result of the shooting. Tatianna testified that she was not drinking on the night of the shooting, that she had dated Jeremie for six years, and that they had two children together. She stated that she never mentioned the previous July, 31, 2008 incident with the defendant to the police or to the grand jury.

¶ 8 Prior to Jeremie's testimony, the State informed the court that it was unsure whether its witness, Jeremie, would recant his prior identification of the defendant as the shooter on the witness stand. The State explained that although Jeremie had previously identified the defendant as the shooter during his grand jury testimony, he had subsequently made audiotaped and videotaped statements³ to the police and a confidential informant that he did not see the shooter. The State informed the court that in the event that Jeremie testifies at trial that he did not see the shooter, the State planned to impeach him with his grand jury testimony. However, the State

³ During pretrial proceedings, the trial court ruled that six discs of the recordings were relevant. Copies of those discs were tendered to defense counsel.

argued that, under that scenario and pursuant to case law, defense counsel would then be prohibited from introducing the audio and video recordings because they would be considered prior *consistent* statements that occurred *after* the impeaching statement (the grand jury testimony) was made. The trial court then ruled that, if the timing as to the existence of the grand jury testimony and the recordings was as the State had described—that is, that the grand jury testimony was made before the recorded statements—then the recorded statements would be inadmissible.

¶ 9 Jeremie testified that he had an alias of "Arkese Newton" and was incarcerated for an unrelated crime at the time of trial in the instant case. Jeremie had dated Tatianna for about four or five years, had two children with her, had known the defendant for six or seven years, and he knew the defendant by the name of "Mar-Mar." At about 11:30 p.m. on October 8, 2008, Jeremie, Tatianna, Roxanne, Kiawana, and Dominique drove to the area of the 4800 block of Polk Street, where Jeremie exited the vehicle to speak with some people on the sidewalk while the rest of his companions stayed in the vehicle. Tyrice was one of the individuals standing on the sidewalk. About five minutes later, a maroon Jeep pulled up and someone started shooting from it. He testified that he saw the shooter reach his hand out of a window in the back driver's side of the maroon Jeep, saw fire come out of the person's hand, and heard about five or six gunshots. At trial, Jeremie denied that the defendant was the shooter. Jeremie did not recall making eye contact with the shooter, did not recall seeing the shooter nod his head towards him, and did not recall nodding back at the shooter. After Jeremie was shot in the foot, he fled in the opposite direction to a gangway and then went home. About an hour and a half later, Jeremie went to the hospital but did not receive any treatment for his gunshot wound. At about midnight on October 9, 2008, he spoke with some detectives at the hospital. However, at trial, Jeremie

denied telling Detective Coleman that he recognized the person in the back driver's side of the maroon Jeep as the defendant; denied telling Detective Coleman that he knew the defendant from the neighborhood; denied telling Detective Coleman that the defendant nodded at Jeremie as if to say hello; and denied telling Detective Coleman that the defendant then pulled out a semiautomatic handgun and began firing in Jeremie's direction. Jeremie claimed that he told Detective Coleman that he was not on Polk Street at the time of the shooting. Following this line of questioning, the parties stipulated that Detective Coleman would testify that Jeremie told him at the hospital that he recognized the defendant as the shooter riding in the back driver's side of the maroon Jeep, that the defendant nodded as if to say hello to Jeremie, and that the defendant fired a semiautomatic weapon in Jeremie's direction. The State also presented Jeremie's grand jury testimony, in which he testified to seeing the defendant fire a gun from an open window at the back driver's side of the maroon vehicle. The State also presented evidence that, during his grand jury testimony, Jeremie signed a photograph of the defendant identifying him as the shooter.

¶ 10 On cross-examination, Jeremie testified that the shooter was a man named "Little Terry," whom he knew from the neighborhood. According to Jeremie, he had named the defendant as the shooter during his grand jury testimony because he was "on the run for a case out of town, a major case that was out of town," and he was worried that the police would charge him with the crime if he did not identify the defendant as the shooter. During this point on cross-examination, defense counsel informed the trial court that he had an evidentiary question. Defense counsel reminded the court that its previous ruling regarding the inadmissibility of audio and video recordings of Jeremie, in which he claimed he did not see the shooter, was based on the assumption that Jeremie was going to testify to not knowing the identity of the shooter at trial

and thus, the recordings would have been prior *consistent* statements. Defense counsel argued that because Jeremie testified at trial that Little Terry was the shooter, his recorded statements denying knowledge of the identity of the shooter were no longer prior *consistent* statements but instead prior *inconsistent* statements that should be admissible to impeach Jeremie. The trial court stated that the "[s]ame ruling stands" and defense counsel was not allowed to question Jeremie about his recorded statements.

¶ 11 Officer Dean Barney (Officer Barney) testified that on October 8, 2008, he was assigned to process the crime scene at 4855 West Polk Street. He photographed the scene and recovered seven shell casings from the area in front of Roxanne's vehicle, as well as one metal bullet fragment behind her vehicle. Officer Barney also recovered a bullet from the front passenger floorboard of Roxanne's vehicle, observed a bullet hole in the front passenger door, and observed damage to the windshield and right fender of her vehicle. At trial, he identified photographs depicting the shell casings, bullet fragment, bullet, and the damage to the vehicle.

¶ 12 Officer Brian Thomas (Officer Thomas) testified that at about 7:30 p.m. on March 12, 2009, he and Officer Ortega stopped a vehicle for a traffic violation in the area of 5800 South Morgan Street in Chicago. When Officer Thomas approached the stopped vehicle, he observed three occupants—Mark Hill, Darrell Hill, and Martell Hill. A .45-semiautomatic handgun was eventually recovered from the rear seat of the vehicle where Mark Hill was seated.

¶ 13 Forensic Scientist Tonia Brubaker (Brubaker) testified that she specialized in the field of firearms identification. She testified that she examined the ballistics evidence recovered in this case—including the shell casings, the bullet fragment, the bullet recovered from the floorboard of Roxanne's vehicle, and the bullet removed from Tyrice's body during autopsy—and

determined to a reasonable degree of scientific certainty that they were fired from the handgun recovered by Officer Thomas on March 12, 2009.

¶ 14 The parties stipulated to the testimony of the medical examiner, Dr. Ponni Arunkumar (Dr. Arunkumar), who performed an autopsy of Tyrice's body. Dr. Arunkumar would testify that Tyrice suffered from two bullet wounds: one bullet entered his mid-lower back and traveled through his heart to his abdominal wall; a second bullet entered and exited his right leg. She would observe that there was no evidence of close-range firing, and would testify to a reasonable degree of medical certainty that the cause of death was multiple gunshot wounds and that the manner of death was homicide.

¶ 15 After the State rested its case-in-chief, the defense rested without presenting any evidence. Following closing arguments, the trial court made the following remarks in finding the defendant guilty as charged:

"Prior to today's date I had a chance to look over my notes of other testimony and I also viewed them again this morning during the course of each counsel's arguments to prepare points that each of you made. Both sides pointed to some inconsistencies in the witnesses. It happens in a lot of cases, determines whether or not the inconsistencies raise a reasonable doubt or present a reasonable doubt in this case.

Also had the chance to remember witnesses when they testified, I had a chance and did closely listen to them while they were testifying to determine their credibility and examine their demeanor while testifying as well."

¶ 16 On September 26, 2012, the defendant filed a motion for a new trial, which the trial court denied on October 24, 2012. On October 24, 2012, following a sentencing hearing in which defense counsel presented no evidence in mitigation, the trial court sentenced the defendant to 50 years of imprisonment for the first-degree murder of Tyrice, which included a 25-year sentence enhancement for personally discharging a firearm that proximately caused Tyrice's death. The trial court also sentenced the defendant to 35 years of imprisonment for the attempted murder of Tatianna, which included a 20-year sentence enhancement for personally discharging a firearm. The trial court also imposed a 15-year sentence for the defendant's conviction for aggravated battery with a firearm of Roxanne. The trial court ordered that the sentences for attempted murder and aggravated battery with a firearm be imposed concurrently, but ordered that those sentences run consecutively to his first-degree murder sentence. Subsequently, the trial court denied the defendant's motion to reconsider the sentence.

¶ 17 On that same day, October 24, 2012, the defendant filed a timely notice of appeal accordingly we have jurisdiction. According we have jurisdiction. On December 13, 2013, this court allowed the defendant leave to file an amended notice of appeal to reflect the correct offenses and sentences

¶ 18 ANALYSIS

¶ 19 We determine the following issues on appeal: (1) whether the trial court erred in limiting defense counsel's cross-examination of Jeremie by prohibiting the introduction of prior recorded statements made by Jeremie; (2) whether the trial court applied the wrong legal standard in finding defendant guilty of the charged offenses; and (3) whether the trial court erred in imposing two firearm-enhancement sentences for defendant's first-degree murder and attempted murder convictions.

¶ 20 We first determine whether the trial court erred in limiting defense counsel's cross-examination of Jeremie by prohibiting the introduction of prior recorded statements made by Jeremie.

¶ 21 The defendant argues that the trial court violated his right to confrontation by preventing defense counsel from impeaching Jeremie on cross-examination with prior recordings in which he claimed he did not see the shooter. He argues that the trial court's ruling was an abuse of discretion because, in light of Jeremie's trial testimony identifying the shooter as Little Terry, Jeremie's prior recorded statements were prior *inconsistent* statements which should have been admissible to impeach him. He contends that the rationale given by the trial court in making this ruling suggested that it excluded the recorded statements based on a nonexistent legal principal. The defendant maintains that the trial court's error was not harmless, where the trial evidence against him was not overwhelming.

¶ 22 The State counters that the trial court properly exercised its discretion in limiting defense counsel's cross-examination of Jeremie at trial. Specifically, the State argues that the recordings were prior *consistent* statements, where Jeremie did not identify the defendant as the shooter in either the recorded statements or in his trial testimony. The State further argues that defense counsel's purpose in seeking to introduce the recordings was "in accordance with the purpose of introducing a consistent statement," because he intended to bolster Jeremie's trial testimony that the defendant was not the shooter. The State contends that, contrary to the defendant's assertion, the trial court did not rely on a nonexistent legal principal in limiting defense counsel's cross-examination of Jeremie. The State contends that, even if the trial court erred in limiting defense counsel's cross-examination of Jeremie, any error was harmless where the result of the

proceedings would have been the same and the defendant was not prejudiced because Jeremie's trial testimony was favorable to the defendant.

¶ 23 A criminal defendant has the fundamental right to confront the witnesses against him, including the right to cross-examine those witnesses. U.S. Const., amend. VI; *People v. Wallace*, 331 Ill. App. 3d 822, 832 (2002). A trial court may not deprive a defendant of the right to question witnesses; however, it may limit the scope of cross-examination. *Wallace*, 331 Ill. App. 3d at 832. A trial court retains wide latitude to impose reasonable limits based on concerns about harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or of little relevance. *Id.* The confrontation clause of the sixth amendment of the United States Constitution " ' guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. " ' " (Emphasis in original.) *People v. Klepper*, 234 Ill. 2d 337, 355 (2009) (quoting *People v. Harris*, 123 Ill. 2d 113, 144 (1988) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985))).

¶ 24 The general rule is that hearsay, defined as " ' an out-of-court statement offered to prove the truth of the matter asserted, ' " is inadmissible at trial. *People v. Wilson*, 2012 IL App (1st) 101038, ¶ 38 (quoting *People v. Gonzalez*, 379 Ill. App. 3d 941, 954 (2008)). However, an exception to the hearsay rule exists to allow for prior inconsistent statements of a testifying witness, which may be admissible to impeach the witness' credibility. *Wilson*, 2012 IL App (1st) 101038, ¶ 38. Section 115-10.1 of the Code of Criminal Procedure (Code) allows for the admissibility of a witness' prior statement if the statement is inconsistent with the witness' testimony at trial; the witness is subject to cross-examination concerning the statement; the statement narrates, describes, or explains an event or condition of which the witness had personal knowledge; and the statement "is proved to have been accurately recorded by a tape recorder,

videotape recording, or any other similar electronic means of sound recording." 725 ILCS 5/115-10.1 (West 2010). The determination of whether a witness' prior statement is inconsistent with his trial testimony is left to the sound discretion of the trial court. *People v. Flores*, 128 Ill. 2d 68, 87-88 (1989). Likewise, the decision as to whether to admit a witness' prior inconsistent statement is within the sound discretion of the trial court. *People v. Watkins*, 368 Ill. App. 3d 927, 931 (2006). An abuse of discretion occurs only where the trial court's ruling is arbitrary or fanciful or where no reasonable person would adopt the trial court's view. *People v. Sangster*, 2014 IL App (1st) 113457, ¶ 47.

¶ 25 In the instant case, prior to calling Jeremie as a witness at trial, the State informed the court that it was unsure whether Jeremie would recant his prior identification of the defendant as the shooter during trial. The State explained that although Jeremie had previously identified the defendant as the shooter in his grand jury testimony, he had later made audiotaped and videotaped statements to the police and a confidential informant that he did not see the shooter. The State informed the court that in the event that Jeremie testifies at trial that he did not see the shooter, the State planned to impeach him with his grand jury testimony. However, the State argued that, under that scenario and pursuant to case law, defense counsel would then be prohibited from introducing the audio and video recordings because they would be considered prior *consistent* statements that occurred *after* the impeaching statement (the grand jury testimony) was made. The trial court agreed with the State, finding that if the timing as to the existence of the grand jury testimony and the recordings was as the State had described, then the recorded statements would be inadmissible. Thereafter, Jeremie took the stand and testified to the events of the shooting, but denied that the defendant was the shooter. The State then impeached him with his grand jury testimony in which he testified to seeing the defendant fire a

gun from an open window at the back driver's side of the maroon vehicle. The State also presented stipulated evidence that Detective Coleman would testify that Jeremie told him at the hospital after the shooting that Jeremie recognized the defendant as the shooter. On cross-examination, however, Jeremie testified that the shooter was Little Terry, claiming that he had previously named the defendant as the shooter during his grand jury testimony because he was worried that the police would charge him with a crime. At that point on cross-examination, defense counsel reminded the court of its initial ruling regarding the inadmissibility of Jeremie's prior recordings, but argued that, in light of Jeremie's trial testimony naming Little Terry as the shooter, his recorded statements denying knowledge of the identity of the shooter were no longer prior *consistent* statements but instead prior *inconsistent* statements that should be admissible to impeach Jeremie. The trial court then stated that the "[s]ame ruling stands" and defense counsel was not allowed to question Jeremie about his prior recorded statements. On appeal, the defendant does not challenge the trial court's initial ruling, prior to Jeremie's testimony, regarding the admissibility of the recorded statements, but challenges only the court's second ruling regarding the admissibility of the recorded statements during Jeremie's cross-examination.

¶ 26 Our examination of the record leads us to conclude that the trial court did not abuse its discretion in prohibiting defense counsel from introducing the prior recorded statements during cross-examination of Jeremie. In neither his recorded statements nor his trial testimony, did Jeremie name the defendant as the shooter. While it is true that Jeremie expressly named Little Terry as the shooter on cross-examination at trial, such identification did not change the fact that Jeremie was not implicating the defendant in the shooting. In other words, whether Jeremie omitted to name anyone in his prior recorded statements, or expressly identified a different individual as the shooter at trial, in essence, characterized his consistent position in those

instances that the defendant was not the shooter. Thus, we find that the evidence supports a finding that the recorded statements were prior *consistent* statements which would not have impeached Jeremie's credibility at trial. See *People v. White*, 2011 IL App (1st) 092852, ¶ 51 (courts have long recognized a bar against prior consistent statements because they serve no purpose other than to bolster trial testimony). Therefore, we hold that the trial court did not err in prohibiting defense counsel from introducing the prior recorded statements during Jeremie's cross-examination.

¶ 27 Notwithstanding the foregoing, the defendant argues that the trial court's ruling in question during Jeremie's cross-examination was erroneous, where the court relied on a nonexistent legal principal in excluding the recorded statements. The entirety of the defendant's argument hinges upon the trial court's remark that the “[s]ame ruling stands.” We find the defendant's argument to be misplaced. First, the crux of the defendant's argument that the trial court misapplied a legal principle is based upon his assumption that Jeremie's prior recorded statements were *inconsistent* with his trial testimony which, as discussed, we had already rejected. Second, in reading the court's remark in its entire context, we find that the defendant cannot overcome the presumption that the trial court knew the law and applied it correctly. See *People v. McDonald*, 276 Ill. App. 3d 466, 477 (1995) (a reviewing court will presume that a trial judge knows the law, and this presumption is rebutted only when the record affirmatively shows the contrary); see *People v. Weston*, 271 Ill. App. 3d 604, 616 (1995) (the presumption that the trial court knows the law is not so easily rebutted by one isolated statement, where the court demonstrated excellent knowledge of the law and facts throughout trial). Thus, we find that the defendant's argument cannot succeed on this basis.

¶ 28 Even assuming, *arguendo*, that Jeremie's prior recorded statements were prior *inconsistent* statements and that the trial court erred in prohibiting defense counsel from introducing them during Jeremie's cross-examination, we find such error to be harmless. Errors pertaining to a defendant's confrontational rights do not automatically warrant reversal. *People v. McClanahan*, 191 Ill. 2d 127, 139 (2000). A constitutional error is harmless where it is beyond a reasonable doubt that the error did not contribute to the finding of guilt. *Id.* The burden of proof is on the State to show beyond a reasonable doubt that the constitutional error did not affect the outcome of the proceeding. *Id.* In the case at bar, the State presented Tatianna's testimony at trial, in which she described in detail the events leading up to the July 31, 2008 verbal altercation with the defendant, as well as the October 8, 2008 shooting. Tatianna testified specifically that, on the night of the shooting, she was sitting in Roxanne's vehicle on the 4800 block of Polk Street when she heard screeching tires and gunshots from behind the vehicle, and she observed the defendant fire a gun out of the open back driver's side window of the maroon SUV. The State also presented the testimony of Roxanne and Dominique, who corroborated Tatianna's testimony that they were all seated in Roxanne's vehicle at the time the initial gunshots sounded from behind Roxanne's vehicle. Dominique's testimony also corroborated Tatianna's testimony that the shooter fired the gun from an open window at the back driver's side of the SUV as it passed Roxanne's vehicle, and that Tatianna and the defendant had engaged in a previous verbal altercation on July 31, 2008 during which the defendant had threatened to shoot her in the face. The defendant points to several discrepancies between Tatianna and Dominique's testimony, as well as inconsistencies within Tatianna's testimony, in arguing that Tatianna's account of the shooting was problematic. However, the discrepancies and inconsistencies complained of—including the exact location where the defendant had

threatened Tatianna on July 31, 2008; Tatianna's exact location prior to the shooting; and whether Tatianna first looked in a side mirror or over her shoulder before seeing the maroon SUV—were insignificant and did not bear on the material parts of Dominique's and Tatianna's detailed testimony about the July 21, 2008 incident or the October 8, 2008 shooting. Further, we reject the defendant's argument that impeaching Jeremie with the recordings as prior inconsistent statements would have "uniquely damaged his credibility." At trial, Jeremie's credibility was already at issue when he testified that Little Terry was the shooter, but was then impeached with his grand jury testimony identifying the defendant as the shooter and stipulated evidence was also presented to show that he had told Detective Coleman at the hospital that the defendant was the shooter. Despite knowing Jeremie's inconsistent identification of the shooter, the trial court found him guilty of the charged offenses. Thus, even had Jeremie's prior recorded statements been introduced during Jeremie's cross-examination to impeach Jeremie's credibility which was already at issue during his direct examination, we cannot conclude that it would have affected the outcome of the trial. Nor could we conclude beyond a reasonable doubt that the court's alleged error contributed to the finding of guilt. We further find the defendant's cited cases in support of his argument for reversal to be distinguishable from the facts of the instant case. See *People v. Lerma*, 2014 IL App (1st) 121880 (trial court's error in excluding defendant's expert witness on witness identification was not harmless, where there was only one single eyewitness to the crime who identified defendant as the shooter and no physical evidence linked him to crime); *People v. Quintero*, 394 Ill. App. 3d 716 (2009) (trial court's error in admitting other-crimes evidence regarding defendant's involvement in a prior murder was not harmless, where no physical evidence tied him to the murder and the outcome of the trial hinged on the testimony of one witness whose credibility was suspect); *People v. Flowers*, 371 Ill. App. 3d 326 (2007) (trial

court's improper restriction of defense counsel's cross-examination of witness regarding information contained in witness' mental health records was not harmless in murder trial, where information in the records related to the witness' ability to perceive events surrounding the crime; the witness admitted at trial that he was under the influence of illegal drugs on the morning of the shooting; the witness was one of two eyewitnesses who formed the bulk of the State's case; and the other eyewitness' testimony had credibility issues). Unlike those cases, here, there were multiple witnesses to the shooting; the outcome of the trial did not hinge upon Jeremie's identification of the defendant in his grand jury testimony or in the stipulated evidence regarding Detective Coleman; and there was no evidence undermining Tatianna or the other witnesses' ability to perceive the events surrounding the shooting. Therefore, we find the trial court's alleged error to be harmless beyond a reasonable doubt, where the outcome of the trial would not have been different even absent the error. Accordingly, we hold that the defendant's argument on this basis must fail.

¶ 29 We next determine whether the trial court applied the wrong legal standard in finding the defendant guilty of the charged offenses, which we review *de novo*. See *People v. Campos*, 349 Ill. App. 3d 172, 176 (2004) (whether the trial court applied the proper legal standard is a question of law requiring *de novo* review).

¶ 30 The defendant argues that the trial court violated his due process rights by applying the wrong legal standard in finding him guilty of the charged offenses. Specifically, he argues that in determining the sufficiency of the evidence, the trial court erroneously "assumed guilt and required proof a reasonable doubt exists" instead of "requiring the State to present evidence of guilt and prove the *lack* of a reasonable doubt." He asserts that the trial court further erred in relying on the facts of other cases in making its ruling. The defendant acknowledges that this

issue was not properly preserved for review on appeal, but argues that the plain error doctrine applies to reach the forfeited issue.

¶ 31 The State counters that the plain error doctrine does not apply to reach this forfeited issue, where no error occurred because the trial court applied the correct standard and did not shift the burden of proof to the defendant in finding him guilty of the charged offenses. The State argues that the defendant misinterpreted the record and the complained-of comments made by the trial court did not support his claim that the court erroneously shifted the burden to him. The State argues that, even if an error occurred, the defendant could not prevail where the evidence was not closely balanced and the alleged error did not amount to structural error requiring reversal.

¶ 32 Due process requires that the State bear the burden of proving all elements of the charged offense beyond a reasonable doubt. *People v. Howery*, 178 Ill. 2d 1, 32 (1997). The burden of proof never shifts to the accused, but remains with the State throughout the trial. *Id.* The defendant is presumed innocent throughout the course of the trial and does not have to prove his innocence, testify, or present any evidence. *People v. Cameron*, 2012 IL App (3d) 110020, ¶ 27.

¶ 33 The trial court is presumed to know the law and apply it correctly, and the presumption cannot be rebutted absent strong affirmative evidence to the contrary in the record. *Howery*, 178 Ill. 2d at 32. Thus, the specific inquiry before us is whether the record in the case at bar contains strong affirmative evidence that the trial court incorrectly allocated the burden of proof to the defendant in this case.

¶ 34 We agree with the parties that this issue has been forfeited for review on appeal, where defense counsel failed to object at trial and failed to raise the issue in a posttrial motion. The plain error doctrine allows a reviewing court to consider a forfeited issue affecting substantial

rights in two circumstances: (1) where the evidence is closely balanced, regardless of the seriousness of the error; or (2) where the error is so serious that the defendant was denied a substantial right, regardless of the closeness of the evidence. *People v. Herron*, 215 Ill. 2d 167, 178-79, 186-87 (2005). Under both prongs, the burden of persuasion remains with the defendant. *Id.* at 187. The first step of plain-error review is to determine whether any error occurred at all. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010).

¶ 35 In finding the defendant guilty of the charged offenses, the trial court made the following remarks:

"Prior to today's date I had the chance to look over my notes of other testimony and I also viewed them again this morning during the course of each counsel's arguments to prepare points that each of you made. *Both sides pointed to some inconsistencies in the witnesses. It happens in a lot of cases, determines whether or not the inconsistencies raise a reasonable doubt or present a reasonable doubt in this case.*

Also had the chance to remember witnesses when they testified, I had a chance and did closely listen to them while they were testifying to determine their credibility and examine their demeanor while testifying as well." (Emphasis added.)

The defendant argues that the above-italicized portions of the trial court's comments show that the court failed to apply the correct legal standard in determining the sufficiency of the evidence.

¶ 36 We find no evidence in the record to support the defendant's arguments that the trial court improperly shifted the burden of proof to the defendant, or that the trial court "assumed [his]

guilt and required proof [that] a reasonable doubt exists." The remarks complained-of merely show that the trial court considered the inconsistencies in the testimony of the witnesses in assessing their credibility, which was squarely within its role as fact finder, and found the defendant guilty despite those inconsistencies. In support of his argument, the defendant cites *People v. Devine*, 295 Ill. App. 3d 537 (2008). In *Devine*, the reviewing court reversed the defendant's conviction and ordered a new trial, where the trial court had "improperly placed on defendant a burden to rebut a *prima facie* case and thereby denied defendant his constitutionally guaranteed right to the presumption of innocence and proof beyond a reasonable doubt." *Id.* at 544. Specifically, in finding the defendant guilty, the trial court in *Devine* had expressly stated that the defendant had to "establish that there's reasonable doubt" that he was not guilty of the offense; and that the State's *prima facie* case had not been "rebutted." *Id.* We find *Devine* to be highly distinguishable from the facts in the case at bar. Unlike *Devine*, the record contains nothing to show that the trial court required the defendant to carry any burden of proof or required the defendant to prove the existence of a reasonable doubt to establish his innocence. Thus, the evidence does not support the defendant's claim that the trial court improperly shifted the burden of proof to him. Likewise, we reject the defendant's argument that the trial court's comment regarding how "[i]t happens in a lot of cases" shows that the court improperly relied on irrelevant evidence outside the scope of this trial in making its ruling. Reading the remark in its context, we find that the court commented that inconsistencies in witness testimony occur in "a lot of cases," but there is no evidence to suggest that the court improperly relied on the evidence in other cases, or the judge's own experience in other cases, in finding the defendant guilty in the present case. Because the evidence does not establish any affirmative evidence, let alone strong affirmative evidence, necessary to rebut the presumption that the trial court knew the law and

applied it correctly, we find that the defendant has not established that an error occurred. Accordingly, the plain error doctrine does not apply to reach the forfeited issue.

¶ 37 We next determine whether the trial court erred in imposing two firearm enhancement sentences for his first-degree murder and attempted murder convictions.

¶ 38 On October 24, 2012, following a sentencing hearing, the trial court sentenced the defendant to 50 years of imprisonment for the first-degree murder of Tyrice, which included a 25-year sentence enhancement for personally discharging a firearm that proximately caused Tyrice's death. The trial court also imposed a 35-year sentence for the defendant's conviction for the attempted murder of Tatianna, which included a 20-year sentence enhancement for personally discharging a firearm. The trial court further sentenced the defendant to 15 years of prison for his conviction for aggravated battery with a firearm of Roxanne. The trial court ordered that the sentences for attempted murder and aggravated battery with a firearm be imposed concurrently, but ordered that those sentences run consecutively to his first-degree murder sentence—for a total of 85 years of imprisonment.

¶ 39 The defendant argues that the imposition of two firearm-enhancement sentences for his first-degree murder and attempted murder convictions shocks the moral conscience, where those convictions required a minimum of 71 years in prison. The defendant argues that the minimum requirement of a 71-year sentence is in essence a *de facto* life sentence that offends "all sense of proportionality." He claims that the imposition of two firearm-enhancement sentences amounting to a *de facto* life sentence was unconstitutional, because it prevented the court from considering the facts of the crime or his background, and prevented the court from meaningfully assessing the case "in mitigation or in aggravation." Further, he contends that because the threat posed by the use of a firearm remains the same regardless of the number of offenses committed

with that firearm, the imposition of two separate firearm-enhancement sentences was unconstitutional. The defendant requests that this court vacate the 20-year firearm-enhancement for his attempted murder conviction and remand the case for resentencing.

¶ 40 The State responds that the trial court correctly applied the mandatory statutory firearm enhancements to the defendant's separate charges of first-degree murder and attempted first-degree murder. Specifically, the State argues that the application of the 25-year and 20-year firearm-enhancement sentences were mandated by statute in deterring gun violence and did not violate the defendant's rights, where the court had found that he personally discharged a firearm that proximately caused Tyrice's death and that he personally discharged a firearm that injured Tatianna. Because the defendant committed separate offenses, the State argues, the trial court properly imposed separate firearm enhancements to each of his separate convictions for first-degree murder and attempted murder.

¶ 41 A constitutional challenge to a statute may be raised at any time and is subject to *de novo* review. *People v. Robinson*, 2011 IL App (1st) 100078, ¶ 12. Statutes are presumed to be constitutional. *People v. Sharpe*, 216 Ill. 2d 481, 487 (2005). "To overcome this presumption, the party challenging the statute must clearly establish that it violates the constitution." *Id.* Article I, section 11 of the Illinois Constitution provides that "[a]ll penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship." Ill. Const. 1970, art. I, § 11. A defendant's sentence violates the proportionate penalties clause of the Illinois Constitution when: (1) the penalty is "cruel, degrading, or wholly disproportionate to the offense committed as to shock the moral sense of the community"; or (2) the penalty is "harsher than the penalty for a different offense that contains identical elements." *People v. Williams*, 2012 IL App (1st) 100126, ¶ 48. Here, the

defendant challenges the imposition of the two firearm-enhancement sentences on the basis that they were disproportionate to the crimes committed as they shock the moral conscience.

¶ 42 Section 5-8-1 of the Unified Code of Corrections (Code of Corrections) provides that a first-degree murder conviction carries a sentencing range of 20 to 60 years of imprisonment, and that a 25-year firearm enhancement must be added to the sentence if, during the commission of the offense, "the person personally discharged a firearm that proximately caused *** death to another person." 730 ILCS 5/5-8-1(a)(1)(a), (a)(1)(d)(iii) (West 2008). A conviction for attempted first-degree murder carries a sentencing range of 6 to 30 years of imprisonment, with a mandatory 20-year firearm enhancement added to the sentence if, during the commission of the crime, the person personally discharged a firearm. 730 ILCS 5/5-8-1(a)(3) (West 2008); 720 ILCS 5/8-4(c)(1)(C) (West 2008). A conviction for aggravated battery with a firearm is a Class X felony which triggers a sentencing range of 6 to 30 years of imprisonment. 720 ILCS 5/12-4.2(a)(1), (b) (West 2008); 730 ILCS 5/5-8-1(a)(3) (West 2008).

¶ 43 Based on the relevant sentencing statutes, we find that the trial court's imposition of the defendant's sentences was within the statutory range allowed by the legislature: 50-year sentence for first-degree murder (which included a mandatory 25-year firearm-enhancement for personally discharging the firearm that proximately killed Tyrice); 35-year sentence for attempted murder (which included a 20-year firearm-enhancement for personally discharging a firearm at Tatianna); and 15-year sentence for aggravated battery with a firearm of Roxanne.

¶ 44 Nonetheless, the defendant argues that being sentenced to two firearm enhancements was unconstitutional where it resulted in a *de facto* life sentence that was disproportionate to the crimes and "shocks the moral conscience." Specifically, he argues that under the sentencing statutes, the required minimum sentence of 71 years in prison (minimum 20 years plus 25-year

firearm add-on for first-degree murder + minimum 6 years plus 20-year firearm add-on for attempted murder = 71 years) was a *de facto* life sentence that was unconstitutional, because 45 of the 71 years were not imposed for the offenses but for the defendant's use of the firearm during the commission of the crimes. He contends that this minimum *de facto* life sentence, which does not allow the court to take into account his rehabilitative potential, violates the proportionate penalties clause. He argues that the imposition of one firearm-enhancement sentence is sufficient to advance the public policy of preventing bystanders from being injured, and that the imposition of a second firearm-enhancement sentence shocks the conscience.

¶ 45 We find, and the defendant acknowledges, that our supreme court in *Sharpe* has rejected the argument that the firearm enhancement for first-degree murder "shocks the moral sense of the community" or violates the proportionate penalties clause. *Sharpe*, 216 Ill. 2d at 524. The *Sharpe* court, citing its previous ruling in *People v. Morgan* (203 Ill. 2d 470 (2003)), reiterated that firearm enhancements applied to *attempted* first-degree murder convictions are also "neither cruel nor degrading, nor would [they] shock the moral sense of the community." *Sharpe*, 216 Ill. 2d at 524. The *Sharpe* court noted that the sentence enhancements were put into place because of the legislature's recognition of the significant danger posed when a firearm is involved in a felony, and concluded that "it would not shock the conscience of the community to learn that the legislature has determined that an additional penalty ought to be imposed when murder is committed with a weapon that not only enhances the perpetrator's ability to kill the intended victim, but also increases the risk that grievous harm or death will be inflicted upon bystanders." *Id.* at 524-25. Indeed, that is precisely what occurred in this case. Additionally, our supreme court in *Sharpe* rejected the defendant's argument that by setting a mandatory minimum sentence

for murder involving a firearm, the legislature failed to consider the rehabilitative potential of the offender. *Id.* at 525-26.

¶ 46 While the defendant acknowledges the holding in *Sharpe* that the imposition of individual mandatory firearm enhancements did not violate the proportionate penalties clause, he argues that the imposition of the *two combined* firearm enhancements for first-degree murder and attempted murder in the case at bar "shocks the conscience." In support, he cites to *People v. Miller* (202 Ill. 2d 328 (2002)), in which our supreme court held that a mandatory life sentence that resulted from "three converging statutes" was unconstitutionally "as applied" to a juvenile defendant who had been tried and convicted as an adult. *Miller* involved a rare convergence of several factors: the defendant was a 15-year-old juvenile who, by statute, was automatically transferred for trial as an adult; the defendant was tried under an accountability theory which, by statute, holds all participants with a common criminal design equally responsible; and the applicable multiple-murder sentencing statute does not allow consideration of the defendant's age or extent of participation in the crime. *Id.* at 340. In holding that the statutorily-mandated life sentence with no possibility of parole imposed on the defendant was particularly harsh and unconstitutionally disproportionate, the *Miller* court found:

"a mandatory sentence of natural life in prison with no possibility of parole grossly distorts the factual realities of the case and does not accurately represent defendant's personal culpability such that it shocks the moral sense of the community. This moral sense is particularly true, as in the case before us, where a 15-year-old with one minute to contemplate his decision to participate in the incident and stood as a lookout during the shooting, but never

handled a gun, is subject to life imprisonment with no possibility of parole—the same sentence applicable to the actual shooter." *Id.* at 341.

¶ 47 We find the defendant's reliance on *Miller* to be misplaced. None of the factors or statutes at issue in *Miller* are present in the case before us. In the case at bar, the defendant was a 20-year-old adult at the time of the shooting, when he deliberately and repeatedly fired a gun out of the window of a moving vehicle at another vehicle full of occupants—resulting in the death of a bystander, Tyrice, and the injury to others. The defendant's actions during the drive-by shooting in which he was the lone shooter, demonstrated a total disregard for human life. Because the defendant committed the separate crimes of first-degree murder and attempted first-degree murder, and each of those offenses required the imposition of firearm-enhancement sentences in deterring gun violence, we cannot conclude that the defendant's sentences shocked the moral sense or were unconstitutionally disproportionate to the offenses. Accordingly, we hold that the trial court did not err in imposing two firearm enhancement sentences, as required by statute, for his first-degree murder and attempted murder convictions.

¶ 48 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 49 Affirmed.