2016 IL App (1st) 142846-U

SIXTH DIVISION
Order filed: September 23, 2016

No. 1-14-2846



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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | Cook County |
| | ) | |
| v. | ) | No. 12 CR 17111 |
| | ) | |
| TERRANCE GRANT, | ) | Honorable |
| | ) | Joan O'Brien, |
| Defendant-Appellant. | ) | Judge, Presiding. |

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PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justices Cunningham and Rochford concurred in the judgment.

**ORDER**

¶ 1 *Held*: The defendant's conviction and sentence are affirmed where (1) the State 's failure to correct the false testimony of one of its witnesses was harmless error; (2) the trial court did not abuse its discretion in admitting a prior consistent statement; (3) the prosecutor's remarks during rebuttal closing argument were proper; (4) the trial court did not err in considering the defendant's prior AUUW conviction as a factor in aggravation during sentencing; and (5) defense counsel was not ineffective for failing to preserve the above claims of error for appellate review.

¶ 2 Following a jury trial, the defendant, Terrance Grant, was convicted of two counts of armed robbery with a firearm (720 ILCS 5/18-2(a)(2) (West 2012)) and sentenced to 32 years' imprisonment. On appeal, he argues that: (1) the State failed to correct the perjured testimony

of one of its witnesses; (2) the trial court erred by admitting a witness's prior consistent statement; (3) the prosecutor's rebuttal closing argument was improper; and (4) the trial court erred in considering an improper factor in sentencing. The defendant admits that he did not properly preserve these claims of error for our review. He asks that we review his claims under the plain-error doctrine or as a claim of ineffective assistance of counsel. For the reasons that follow, we affirm the defendant's conviction and sentence.

¶ 3 At trial, the State introduced evidence establishing that, on August 20, 2012, at approximately 9:30 p.m., two high school students, Justin Weaver and Jonathan Savage, were walking to Weaver's house from a Taco Bell located near 95th Street and South Ashland Avenue in Chicago. As they approached South Laflin Street, a man, who was later identified as the defendant, confronted them and demanded Weaver's cell phone. Weaver testified that he hesitated at first and asked, "what do you mean[?]" In response, the defendant lifted his shirt, put his hand on a gun that was tucked into his waistband, and threatened to shoot Savage in the face. Weaver stated that he gave the defendant his wallet and white iPhone while Savage handed the defendant a cell phone and loose change. After taking the property, the defendant ran north on Laflin, turned around, and told Weaver and Savage that "this is [his] territory" and if they come back, he will shoot them.

¶ 4 After the defendant fled on foot, Weaver and Savage immediately ran to Weaver's house and called the police. When the police arrived, Weaver described the offender as a male with a dark complexion, wavy hair, and wearing a blue Nike zip-up hoodie. He also described the handgun as "automatic, black, shiny" with orange and red sights. Weaver further testified that, while the police were at his house, he used the "Find My iPhone" application on his iPad, which displayed the location of his iPhone on a map. Weaver explained that his iPhone was initially

turned off, but after 15 or 20 minutes, its location "popped up," thereby allowing the police to track, in real time, its location.

¶ 5 Savage testified to the same sequence of events as Weaver. He added that the defendant was a male in his late teens, six feet in height, with a dark complexion and short wavy hair, and wore a blue zip-up Nike jacket, pants and dark shoes.

¶ 6 Ashfath Osman testified that, on August 20, 2012, he was working at the JJ Fish & Chicken (JJ Fish) restaurant located at 7450 South Martin Luther King Drive in Chicago. At 9:30 or 9:40 p.m., he was in the kitchen when his coworker told him that someone in the restaurant wanted to sell a white iPhone for $300. Osman inspected the iPhone and told the man he only had $200, but the man said he needed at least $250. At some point during the negotiations, Osman noticed a police officer enter the restaurant and search the man. Osman testified that after the man was searched, the man agreed to sell the iPhone for $200. Following the transaction, several police officers entered the restaurant and asked Osman if he had seen a phone. Osman testified that he initially lied to the police because he was "nervous and scared" but he eventually told them that he purchased an iPhone from a man who was wearing a red hat.

¶ 7 Angelo McKenzie also testified at trial. He began his testimony by admitting that he is currently being held in the Cook County jail on unrelated residential burglary charges. He also acknowledged that he was convicted for aggravated unlawful use of a firearm and served a two-year sentence based upon the events that took place on August 20, 2012.

¶ 8 McKenzie testified that, at approximately 7 p.m. on August 20, 2012, the defendant picked him up and drove to 89th Street and Ashland Avenue where he parked the vehicle, put on a blue zip-up jacket, and walked away. McKenzie, who remained in the vehicle, stated that he lost sight of the defendant but that the defendant returned 10 or 20 minutes later, "popped the

trunk," entered the vehicle, took off the blue jacket, put on a red hat, and drove to a JJ Fish restaurant. McKenzie testified that he followed the defendant into the restaurant, but returned to the defendant's vehicle to retrieve a gun from the trunk, at the defendant's request. After McKenzie re-entered the restaurant, he noticed a police car enter the parking lot of JJ Fish and slow down near the front door. He explained that when he observed the vehicle's brake lights, he exited the restaurant through a side door and hid the gun behind a garbage can along the side of the building. McKenzie stated that he was stopped and searched by a female police officer, detained, and transported to a police station where he was questioned by detectives and confronted with surveillance footage which showed him walking past the drive-thru window, removing a gun from his waistband, and then throwing it behind a garbage can. McKenzie testified that he confessed and told the detectives, "[t]hat's me" and "I had the gun." On cross-examination, McKenzie clarified that he never saw the defendant with a gun and never saw him rob anyone. He also denied having had any conversations with the defendant about an armed robbery.

¶ 9 Officer Delgado of the Chicago police department testified that he was on patrol with his partner, Officer Szymanski, when he heard a radio message reporting a recent armed robbery. The radio message described the offender as a "male, black, dark-skinned, about six-foot tall, wearing dark pants and a blue zip-up jacket" and also included the location of the stolen iPhone. Officer Delgado explained that he received frequent updates as to the iPhone's location and was eventually led to a JJ Fish restaurant. Upon arrival, Officer Delgado observed two males inside the restaurant. As he approached the restaurant, the two men separated and walked in opposite directions toward the restaurant's exits. Officer Delgado stopped and frisked one of the men, whom he identified in court as the defendant, at the front door while Officer Szymanski followed

the other man, later identified as McKenzie, who had exited the restaurant through a side door. Officer Delgado testified that the initial search of the defendant and McKenzie did not reveal any cell phone or gun and, as a result, both men were "let go."

¶ 10 Officer Delgado stated that he began searching the outside of the restaurant for a cell phone when he recovered a loaded 9-milimeter handgun that was lying on the ground behind a garbage can near the drive-thru window. He also learned that Officer Szymanski found a blue zip-up jacket inside a car that was parked in the parking lot. At that point, the defendant and McKenzie, who had remained at the JJ Fish restaurant, were detained. When asked what happened next, Officer Delgado explained that he and several other police officers continued to search for the stolen iPhone. They entered the JJ Fish restaurant several times and asked the restaurant clerks if they had seen anyone with a white iPhone. Although the clerks denied seeing any iPhone, Officer Delgado stated that he knew the iPhone was inside the restaurant because its location was "pinging" from that location and then turned off. Eventually, one of the clerks admitted that he purchased a white iPhone from the defendant for $200. After Officer Delgado recovered the iPhone, Officer Mitchell performed a custodial search of the defendant and found $200 in his pants pocket.

¶ 11 Detective Sharon Walker testified that she was assigned to investigate the armed robbery that occurred at 9459 South Laflin Street in Chicago. As part of her investigation, she interviewed Weaver and Savage, and conducted a physical lineup which included the defendant, McKenzie, and four other individuals. Detective Walker testified that Savage and Weaver viewed the lineup separately and each identified the defendant in "a matter of seconds" as the person who robbed them. Savage and Weaver also identified the handgun recovered from the garbage can outside of JJ Fish as the same gun that the defendant used in the robbery. Detective

Walker further testified that when she returned the white iPhone to Weaver, he turned it on, viewed the information contained therein, and confirmed that it was his.

¶ 12 The surveillance video, taken from multiple cameras located inside and outside the JJ Fish restaurant, was admitted into evidence and published to the jury. The parties stipulated that the surveillance footage is a true and accurate recording of what occurred at the restaurant on August 20, 2012. Each portion of video is imprinted with a time stamp, allowing the viewer to ascertain the time of events among multiple cameras, though the time imprinted on the recording may differ from the actual time of day. The video does not contain any audio.

¶ 13 The first portion of video, taken by a camera inside JJ Fish, shows the defendant and McKenzie enter the restaurant at approximately 9:33 p.m. The defendant, who is wearing a red hat, approaches a JJ Fish clerk and hands him a white iPhone. The JJ Fish clerk takes the phone and walks out of the camera's view toward the front counter. Although there is no audio, the defendant appears to have a conversation with one of the clerks who is standing behind the front counter. At approximately 9:37 p.m., a vehicle's head lights and tail lights can be seen through the restaurant's windows and the defendant and McKenzie immediately walk in opposite directions toward the restaurant's exits. A police officer appears at the front door, stops and frisks the defendant, and then walks away without entering the restaurant. The defendant also exits the restaurant but returns less than a minute later, has a brief conversation with a clerk behind the front counter, takes money that is handed to him, and leaves the restaurant.

¶ 14 Surveillance footage from a camera behind the front counter shows Osman with the white iPhone. At 9:40 p.m., the video depicts Osman removing cash from the register and handing it to the defendant. Thereafter, at 10:10 p.m., several police officers walk behind the front counter

and have a conversation with Osman. At 10:28 p.m., Osman retrieves a white iPhone from under a cash register and hands it to Officer Delgado.

¶ 15 The State also played video footage from a camera located outside of JJ Fish, pointing toward the drive-thru window. The video depicts McKenzie walking past the drive-thru window, pulling a handgun out of his waistband, and throwing it behind a garbage can. Minutes later, the video shows Officer Delgado searching outside of the restaurant and recovering the handgun.

¶ 16 At the close of the State's case-in-chief, the defendant moved for a directed finding, which the trial court denied. The defendant rested without presenting any witnesses.

¶ 17 Following closing arguments, the jury found the defendant guilty of two counts of armed robbery. The trial court subsequently sentenced the defendant to 32 years' imprisonment. This appeal followed.

¶ 18 The defendant first contends that his right to a fair trial was violated because the State failed to correct the false testimony of one of its witnesses, McKenzie. The defendant admits that he did not raise this issue at trial and did not include it in his posttrial motion. He asks this court to review his forfeited claim under the plain-error doctrine.

¶ 19 The plain-error doctrine is a narrow and limited exception to the general rule of forfeiture. *People v. Herron*, 215 Ill. 2d 167, 177 (2005). Under the plain-error doctrine, the defendant has the burden to show that a clear or obvious error occurred, and either (1) the evidence is so closely balanced that the error, standing alone, threatened to tip the scales against the defendant regardless of the seriousness of the error, or (2) the error was so serious that it affected the trial's fairness and challenged the integrity of the judicial process. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). Before considering whether the plain-error exception

applies, we must first determine whether any error occurred. *People v. Glasper*, 234 Ill. 2d 173, 203-04 (2009).

¶ 20 The State's knowing use of perjured testimony to obtain a criminal conviction violates a defendant's right to due process of law. *People v. Jimerson*, 166 Ill. 2d 211, 223 (1995). "A conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict." *People v. Olinger*, 176 Ill. 2d 326, 345 (1997). These principles likewise apply where the State, although not soliciting the false testimony, allows it to go uncorrected. *Id.* Furthermore, a verdict will be set aside even where the State fails to correct false testimony that goes only to the witness's own credibility. *Id.* "This is because the 'jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.' " *Id.* (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959)).

¶ 21 In this case, the following colloquy occurred when defense counsel questioned McKenzie on cross-examination regarding any promises that were made to him in exchange for his testimony against the defendant:

> "Q. Are you in negotiations with the Cook County State's Attorney's Office for some modification of this sentence based on your testimony today?
>
> A. No.
>
> Q. So you have no deal with them?
>
> A. [No verbal response].
>
> * * *

Q. Was there a deal with the Cook County State's Attorney's Office on your pending residential burglary case?

A. No.

Q. Are you hoping for a deal?

A. [Unintelligible].

THE COURT: I can't understand you.

BY MR. RAINES [(assistant public defender)]:

Q. You asked for boot camp, didn't you, in order to testify today?

A. No, sir.

Q. You never asked for boot camp?

A. Not at all."

¶ 22 Following McKenzie's testimony, assistant State's Attorney (ASA) Stevens informed the court, outside the presence of the jury that, McKenzie had, in fact, entered into preliminary negotiations with the State regarding the disposition of his residential burglary case. ASA Stevens explained that McKenzie requested five years' imprisonment with a recommendation of boot camp in exchange for his testimony against the defendant. She also stated that she called the prosecutors handling McKenzie's residential burglary case and inquired whether they were amenable to the terms proposed by McKenzie, but no one returned her call, and she was not sure if McKenzie would get the "deal" he requested. Although the State acknowledged that negotiations with McKenzie took place and that he requested leniency in exchange for his testimony against the defendant, the record makes clear that the jury was never informed of this fact. Since the State failed to correct McKenzie's false testimony, his credibility before the jury was never impeached.

¶ 23 Nevertheless, even if the State failed to correct McKenzie's false testimony, review under either prong of the plain-error doctrine is not appropriate. First, the evidence presented at the defendant's trial was far from closely balanced. Unlike the eyewitness testimony of Weaver and Savage, McKenzie testified that he did not see the defendant commit an armed robbery and did not see him with a gun. At best, McKenzie's testimony provided background information as to the defendant's whereabouts before and after the armed robbery occurred and served to corroborate the State's other evidence. At the heart of the State's case was the testimony of Weaver and Savage, who provided overwhelming evidence of the defendant's guilt. They told the jury how the defendant confronted them on the sidewalk, threatened them with a handgun, and took their cell phones, wallet, and loose change. Weaver and Savage also provided accurate and consistent descriptions of the defendant's appearance and positively identified him in a physical lineup later that same night. The State also presented the testimony of Officer Delgado who tracked, in real time, the location of the stolen iPhone to a JJ Fish restaurant where the defendant was in the process of selling the phone to Osman for $200. This testimony was bolstered by the testimony of Osman, as well as surveillance footage showing the defendant handing a white iPhone to Osman, collecting cash, and also showing McKenzie throwing the handgun used in the robbery behind a garbage can. Under the particular facts of this case, in light of the overwhelming evidence of guilt, we believe that the defendant has failed to show a reasonable likelihood that McKenzie's false testimony could have affected the jury's verdict. Accordingly, even if McKenzie had preliminary negotiations with the State and hoped for leniency on his residential burglary charge, reversal of the defendant's conviction on that ground is not warranted. Therefore, review under the first prong of the plain-error doctrine fails because the evidence was not closely balanced.

¶ 24 The defendant also asserts that the State's failure to correct McKenzie's false testimony is reviewable under the second prong of the plain-error doctrine. Under the second prong of plain-error review, prejudice to the defendant is presumed because of the importance of the right involved, regardless of the strength of the evidence. *Thompson*, 238 Ill. 2d at 613. Our supreme court equates the second prong of plain-error review with structural error, that is, a systemic error which serves to erode the integrity of the judicial process and undermine the fairness of the defendant's trial. *Id.* at 613-14.

¶ 25 In support of his argument that the State's failure to correct false testimony constitutes structural error, the defendant cites *People v. Weinstein*, 35 Ill. 2d 467 (1966), and *People v. Abadia*, 328 Ill. App. 3d 669 (2001). However, these cases are inapposite as they involved claims of prosecutorial misconduct during closing argument. Our independent research has revealed no cases holding that the State's failure to correct false testimony is a structural error in which prejudice to the defendant is presumed. Accordingly, the second prong of plain-error review does not provide a basis for excusing the defendant's procedural default.

¶ 26 The defendant alternatively argues that, if we hold that review is improper under the plain-error doctrine, we nevertheless should find that his defense counsel was ineffective for failing to request that the State correct McKenzie's false testimony. We disagree.

¶ 27 To prove ineffective assistance of counsel, the defendant bears the burden of showing that "his attorney's representation fell below an objective standard of reasonableness and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different." *People v. Patterson*, 192 Ill. 2d 93, 107 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). To demonstrate sufficient prejudice under the second prong of the *Strickland* standard, the defendant must show that there is a reasonable probability

that the outcome of the trial would have been different or that the result of the proceeding was unreliable or fundamentally unfair. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). Both prongs of the *Strickland* test must be satisfied to establish an ineffective-assistance-of-counsel claim.

¶ 28 Here, the defendant's argument is based upon trial counsel's failure to preserve his claim that the State failed to correct the false testimony of McKenzie. However, as we just discussed, the defendant has failed to show how McKenzie's false testimony affected the outcome of his trial. As already elaborated in detail above, the evidence against the defendant was overwhelming, and he cannot demonstrate sufficient prejudice under the second prong of the *Strickland* standard. Therefore, his ineffective-assistance-of-counsel claim fails.

¶ 29 We next address the defendant's argument that the trial court erred when it allowed the State to introduce prior statements McKenzie made to the police that were consistent with his testimony at trial.

¶ 30 The State initially asserts, and the defendant concedes, that he failed to preserve this issue by not objecting at trial and raising it in a posttrial motion. The defendant seeks review of this issue under the first prong of the plain-error doctrine. As already noted above, to succeed under this prong, the defendant has the burden of establishing that "a clear or obvious error occurred and the evidence [was] so closely balanced that the error alone threatened to tip the scales of justice against [him], regardless of the seriousness of the error." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). We begin by addressing whether any error occurred.

¶ 31 In general, statements made before trial are inadmissible for the purpose of corroborating trial testimony. *People v. Cuadrado*, 214 Ill. 2d 79, 90 (2005); Ill. R. Evid. 613 (eff. Jan. 1, 2011). The danger in admitting prior consistent statements is that a jury is likely to attach disproportionate significance to them since people tend to believe that which is repeated most

often, regardless of its intrinsic merit, and repetition lends credibility to testimony that it might not otherwise deserve. *People v. Donegan*, 2012 IL App (1st) 102325, ¶ 52. However, prior consistent statements may be admitted to rebut an express or implied charge that (1) the witness acted from an improper influence or motive to testify falsely; or (2) the witness's testimony was recently fabricated. Ill. R. Evid. 613 (eff. Jan. 1, 2011). The party seeking admission of a prior consistent statement carries the burden of proving that the statement was made *before* the alleged fabrication or motive to lie arose. *Donegan*, 2012 IL App (1st) 102325, ¶ 52. "Even where admissible, prior consistent statements may only be used for rehabilitative purposes and are not admissible as substantive evidence." *People v. McWhite*, 399 Ill. App. 3d 637, 641 (2010). We review a trial court's admission of prior consistent statements under the abuse of discretion standard. *People v. Caffey*, 205 Ill. 2d 52, 89 (2001).

¶ 32 The record below reveals that, on cross-examination, defense counsel sought to impugn McKenzie's motive to testify truthfully by questioning him about his expectations for leniency on his pending residential burglary charge. Defense counsel asked McKenzie whether he was in negotiations with the State, whether he was hoping for a "deal," and whether he asked for a reduced sentence in exchange for testifying against the defendant.

¶ 33 In response to defense counsel's charge that McKenzie was motivated to testify falsely, the State sought to rehabilitate McKenzie's credibility by introducing McKenzie's statements to the police on August 20 and 21, 2012. On redirect, the State questioned McKenzie as follows:

> "Q. On August 20, 2012, you spoke to the detectives at the police station; is that correct?
>
> A. Right.

Q. And is what you told the detectives at the police station what you told the ladies and gentlemen of the jury today?

A. Yeah.

Q. And, in fact, on August 21, 2012, at about 8:30 in the morning, you spoke to an Assistant State's Attorney by the name of Colleen Keough, ***; is that right?

A. Yes.

* * *

Q. And when you had a conversation with Miss Keough ***, you told her the exact thing that you just told the ladies and gentlemen of the jury today; is that right?

A. Yes.

Q. So what you just told the ladies and gentlemen of the jury has not changed since August 21, 2012, when you spoke to ASA Keough; is that correct?

A. Right."

¶ 34 In our view, although McKenzie denied having reached an agreement with the State and denied hoping for leniency, defense counsel's cross-examination nevertheless raised an inference that McKenzie's trial testimony was motivated by expectations of leniency and was of recent fabrication. Under these circumstances, the State was well within its right to introduce McKenzie's prior statements to rebut the charge or inference that his testimony was fabricated.

¶ 35 The defendant asserts, however, that McKenzie's statements at the police station do not qualify as prior consistent statements because McKenzie had the same motive to fabricate at that

time as he did at trial. That is, he was motivated to lie to the police and shift the blame to the defendant because he wanted to avoid prosecution. We disagree.

¶ 36 Contrary to the defendant's assertion, there is nothing in the record to indicate that McKenzie sought to shift the blame or avoid prosecution. Rather, he confessed to the police and accepted responsibility for possessing a firearm and at no time did he implicate the defendant in an armed robbery. And, as the State correctly notes, at the time McKenzie made his statements to the police, he was not charged with a residential burglary and was not offered any deals by the police to elicit the statements. Under these circumstances, the record supports the trial court's apparent conclusion that McKenzie's motive to lie did not exist at the time he made his statements at the police station, and we, therefore, cannot conclude that the trial court abused its discretion in admitting McKenzie's prior consistent statements. See *People v. Titone*, 115 Ill. 2d 413, 423 (1986); *People v. Williams*, 147 Ill. 2d 173, 227-28 (1991). Accordingly, the defendant's failure to show that an error occurred here is fatal to his plain-error claim.

¶ 37 Alternatively, the defendant asserts that his trial attorney was ineffective for failing to object to McKenzie's prior consistent statements at trial and include it in his posttrial motion. However, the defendant's failure to show that an error occurred defeats his ineffective assistance claim. See *People v. Hensley*, 2014 IL App (1st) 120802, ¶ 47.

¶ 38 The defendant next contends that he was deprived of his right to a fair trial because the State committed prosecutorial misconduct in rebuttal closing argument. He acknowledges that this issue is forfeited for review, but he asks this court to review his claim under the plain-error exception. Our first step in deciding whether the plain-error exception applies is to determine whether an error occurred. *Glasper*, 234 Ill. 2d at 203-04.

¶ 39 Prosecutors are afforded wide latitude in closing argument, and a prosecutor's comments therein will result in the reversal of a conviction only when they engender substantial prejudice against a defendant to the extent that it is impossible to determine whether the jury's verdict was caused by the comments or the evidence. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). Where a defendant claims that he has been denied the right to a fair trial based on an improper closing argument, the arguments of both the prosecutor and the defense attorney must be reviewed in their entirety so that the prosecutor's statements can be viewed in their proper context. *People v. Kliner*, 185 Ill. 2d 81, 154 (1998). The regulation of the substance and style of closing argument is left to the discretion of the trial court. See *People v. Sims*, 192 Ill. 2d 348, 396 (2000).

¶ 40 Here, during closing argument, the defendant's attorney argued, in pertinent part, as follows:

> "Mr. McKenzie testified earlier today 'I never saw a gun until I went to the trunk to get the gun.' 'When [the defendant] got out of the car, you see a gun?' 'No.' 'You ever see a gun before that?' 'No.' 'You ever see him touch the gun?' 'No.' The only person that touched that gun is Mr. McKenzie.
>
> I submit to you he is lying about that to the police until they showed him the video. Then what did he do? Oh, my God. Well, you got me now. So you can tell what his testimony is. It's called suspect."

¶ 41 In rebuttal argument, the prosecutor responded by arguing:

> "Do you think he wanted to be here? Do you think he wanted to come in here with his friend sitting there? Do you think he wanted to come in this courtroom and have to take that witness stand and talk about what he knows the defendant

did that night? Do you think that was easy? No. But he did it and he didn't do it because he's got a residential burglary that he might get boot camp on.

And you know that because you know on August 21st when he spoke to the police before there was ever a residential burglary or anything, he said the exact same thing that he told all of you today. He wasn't lying because of that.

* * *

How do you know he is telling you the truth? Because [Weaver] and [Savage] corroborate that. [Weaver] and [Savage] said the only person around is this defendant. There is no car that they see parked by that he runs into. He runs down the sidewalk and disappears. [Weaver] and [Savage] corroborate what [McKenzie] told you. And this jacket in that car corroborates what [McKenzie] told you.

[McKenzie] wasn't impeached one time from that witness stand. In fact, the only testimony you heard was that he was consistent since day one. Since August 21st of 2012, he has said the same thing."

¶ 42 The defendant challenges the prosecutor's comment that McKenzie "wasn't impeached one time." He argues the prosecutor misled the jury by suggesting that McKenzie testified truthfully, even though the prosecutor was aware McKenzie provided false testimony.

¶ 43 Based upon our review of the record, however, the prosecutor's comments constituted a fair response to defense counsel's argument which attacked McKenzie's credibility and suggested that he lied to the police. See *Glasper*, 234 Ill. 2d at 204 ("Statements [in closing arguments] will not be held improper if they were provoked or invited by the defense counsel's argument."). Considered in context, the prosecutor responded to defense counsel's argument by explaining to

the jury that McKenzie told the same version of events to the police and his testimony was corroborated by Weaver and Savage. To the extent that the State's assertion that "McKenzie wasn't impeached one time" could be construed as misleading, we do not believe that the comment was so prejudicial that real justice was denied or that the verdict resulted from the error. The comment amounted to little more than an isolated reference and was not highlighted, repeated or otherwise emphasized. See *People v. Walker*, 230 Ill. App. 3d 377, 402 (1992) (no prejudice where remarks were not overemphasized).

¶ 44 In further support of his claim that he was deprived of his right to a fair trial, the defendant maintains that, during the State's rebuttal argument, the prosecutor diminished the role of the jury by suggesting that the jury could not reject the identification testimony of Weaver and Savage.

¶ 45 In rebuttal, the prosecutor argued:

> "So [Weaver] and [Savage] with their eyes in their mind, they saw this defendant's face and you can't tell them they didn't. He was this far away. And counsel said it happened so fast. Things happen fast, real fast. Not to [Weaver] and [Savage]. It was slow motion to them. This defendant was standing in front of them threatening to kill their friend or them. It happened slow. *** They are identifying the guy who was this far away from them demanding their property, nothing covering his face, and they can see him clear as day. Whether or not it's nighttime or dusk or light out, whatever.
>
> They told you from that witness stand that they could see his face. It was starting to get dark out. You can see street lights on one of the streets and you know there are streetlights on 95th. There is [*sic*] just no pictures of it. They told

> you. They had no trouble seeing his face in slow motion. A minute and a half later of looking at that face, those eyes, that nose, that hair, that complexion, and that gun in his waistband. Nobody can take that away from them and tell them that they are wrong. Two years have gone by. They will remember that face no matter how much they want to get it out of their minds for the rest of their lives."

¶ 46 After reviewing the closing arguments in their entirety, as we must, we do not agree with the defendant's assertion that the State diminished the role of the jury. The prosecutor's remarks were made in response to numerous comments made by defense counsel in closing argument which sought to characterize the State's witnesses as mistaken in their identification. For example, defense counsel intimated that Weaver's in-court identification of the defendant was not credible because the armed robbery occurred two years ago, the defendant's appearance has changed since that time, and that Weaver was influenced by a picture he saw of the defendant the day before trial. The defense also argued that the armed robbery was a "life changing event" and Weaver's attention was focused on the gun tucked in the assailant's waistband. The State, in response, argued that Weaver and Savage never wavered in their description and identification of the defendant, and argued why they should be found credible despite the length of time between the robbery and trial.

¶ 47 And, contrary to the defendant's argument, the prosecutor never explicitly told the jury that they could not reject Weaver's or Savage's identification testimony. Indeed, the record demonstrates that the trial court correctly instructed the jury on the factors it should consider in determining the reliability of identification testimony and admonished the jury that the arguments of counsel were not evidence and that the jury should disregard any comments that were not supported by the evidence. The trial court's instructions and admonitions to the jury

ameliorated any possible prejudice resulting from the prosecutor's comments. See *People v. Nunn*, 357 Ill. App. 3d 625, 638-39 (2005).

¶ 48 We similarly reject the defendant's assertion that the prosecutor misstated the evidence when she argued that Weaver and Savage observed the defendant in "slow motion." The prosecutor's remarks were made in response to defense counsel's argument that the armed robbery occurred in "[a] moment in time measured by seconds, maybe even less than a minute ***." See *People v. Gonzalez*, 388 Ill. App. 3d 566, 597 (2008) (prosecutor's statement that "time freezes in slow motion and [is] encrypted in your skull" was a proper response defense counsel's comments that the failure to remember every detail at the time of the shooting rendered identification testimony incredible). Accordingly, we find that the prosecutor's argument was proper.

¶ 49 In sum, the State's and the defendant's closing arguments were extensive and thoroughly explored the facts of the crime based upon the evidence. Viewed in the context of the State's entire argument, the disputed comments were either invited or provoked by defense counsel's argument or amounted to little more than an isolated reference that was not highlighted, repeated or otherwise emphasized. Accordingly, we find that the defendant has failed to establish prosecutorial misconduct in the State's arguments to the jury.

¶ 50 In a related argument, the defendant asserts that his trial counsel provided ineffective assistance by failing to object to the prosecutor's remarks in closing argument. However, as we just discussed, the prosecutor's remarks during closing argument were based upon the evidence presented at trial and were invited by the defense. Therefore, the defendant cannot establish that his attorney's failure to object to the prosecutor's remarks fell below an objective standard of reasonableness, and his ineffective-assistance-of-counsel claim fails.

¶ 51 Finally, the defendant contends that the trial court improperly considered his prior, Class 4 felony conviction for AUUW as a factor in aggravation during sentencing. He argues that the AUUW conviction is void *ab initio* because the Illinois Supreme Court declared the Class 4 version of the AUUW offense unconstitutional in *People v. Aguilar*, 2013 IL 112116, ¶¶ 21-22. He asks this court to either reduce his sentence from 32 to the minimum available sentence of 21 years or alternatively to remand for resentencing.

¶ 52 As with his other claims of error, the defendant acknowledges that he has forfeited his sentencing claim by failing to object in the trial court and raise the issue in a postsentencing motion. *People v. McLaurin*, 235 Ill. 2d 478, 485 (2009). The defendant urges us to review the matter under the second prong of the plain-error doctrine as his sentence impinges upon his fundamental right to liberty.

¶ 53 To obtain relief from the forfeiture of a sentencing issue under the second prong of the plain-error doctrine, a defendant must show that a clear or obvious error occurred and that the error was so egregious it denied the defendant a fair sentencing hearing. *People v. Hillier*, 237 Ill. 2d 539, 544-45 (2010). Absent error, there can be no plain error. Thus, we must first determine whether any error occurred.

¶ 54 To determine whether the trial court erred in considering the defendant's prior AUUW conviction as a sentencing factor, we turn our supreme court's recent decision in *People v. McFadden*, 2016 IL 117424 (petition for rehearing filed July 7, 2016, pending), for guidance. In *McFadden*, the defendant filed a cross-appeal arguing that his 29-year sentence was excessive because the trial court improperly considered his 2002 AUUW conviction as a sentencing factor. According to the defendant, if the trial court "had been aware" that his 2002 AUUW conviction was unconstitutional, it would likely have sentenced him to a lesser term. *Id.* ¶ 39. Our supreme

court disagreed. The supreme court initially noted that the constitutional invalidity of defendant's 2002 AUUW conviction was not confirmed by the record. The court continued, however, that "even if it was constitutionally infirm, the record adequately demonstrates that the weight placed on the 2002 AUUW conviction was not significant and did not warrant a new sentencing hearing." *Id.* ¶ 41. The sentencing hearing showed that the trial court in *McFadden* carefully examined the factors in mitigation and aggravation, before imposing the sentences. In addition, the sentences imposed fell well within the statutory sentencing range. As a consequence, the supreme court concluded that a sentencing reduction or remand for a new sentencing hearing was not required. *Id.* ¶ 48.

¶ 55 In this case, the record reflects that the defendant was convicted of AUUW under section 24-1.6(a)(1) of the statute, the section held unconstitutional in *Aguilar*. Here, as in *McFadden*, the defendant's prior AUUW conviction has not been vacated in an appropriate proceeding. On this basis alone, it is arguable that we could find no error in the consideration of the prior conviction by the trial court here. Nevertheless, even if this conviction is constitutionally infirm, we do not find the weight placed on the conviction by the trial court to be significant. *McFadden*, 2016 IL 117424, ¶ 41. In sentencing the defendant, the trial court heard the evidence in aggravation and mitigation, reviewed the PSI and carefully considered all of the statutory factors in mitigation and aggravation. It considered the defendant's background and recognized that he had the support of two loving parents, came from a good family, and finished high school. The court also considered the nature of the armed robbery and noted that it was committed against two "high school kids" who are "going to have to live with the scars from what he did with—to them mentally for the rest of their lives." With respect to his criminal history, the trial court referenced the defendant's prior AUUW conviction and stated that he was

given a chance to change. In addition, the presentence investigation report revealed that the defendant was a member in the "Gangster Disciples" street gang. The court ultimately concluded that society needs to be protected from the defendant and imposed a 32-year sentence which is 13 years below the maximum permissible sentence for armed robbery enhanced by the use of a firearm. We conclude that, even if the prior AUUW conviction was an improper sentencing factor, the weight placed on the conviction by the circuit court was not significant, and remand for resentencing is not required. See *id.* ¶¶ 41, 46. As a consequence, we find no plain error to excuse his forfeiture of this issue.

¶ 56 The defendant's alternative claim of ineffective assistance of counsel, based upon counsel's failure to preserve the sentencing issue for review, likewise fails. See *People v. Peeples*, 205 Ill. 2d 480, 532 (2002) (where underlying issue has no merit, a defendant suffers no prejudice due to trial counsel's failure to preserve it for appeal).

¶ 57 For the reasons stated herein, we affirm the defendant's conviction and sentence.

¶ 58 Affirmed.