2019 IL App (1st) 161938-U

No. 1-16-1938

Order filed October 8, 2019

Second Division

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 10893
	)	
JEREMY RODRIGUEZ,	)	Honorable
	)	Frank G. Zelezinski,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE FITZGERALD SMITH delivered the judgment of the court. Justices Lavin and Coghlan concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence at trial was sufficient to sustain defendant's convictions for first degree murder. The State's closing arguments were not improper.

¶ 2 Following a jury trial, defendant Jeremy Rodriguez was found guilty of two counts of first degree murder (720 ILCS 5/9-1(a)(1), (2) (West 2008)) and sentenced to natural life imprisonment. On appeal, defendant challenges the sufficiency of the evidence, arguing that where "incredible and unreliable" eyewitness identifications were the only direct evidence

against him, the State failed to prove beyond a reasonable doubt that he was the person who shot and killed the two decedents. Defendant further contends that he was denied a fair trial because, in closing argument, the State improperly commented on his failure to testify, thus shifting the burden of proof, and improperly informed the jury that witnesses were afraid of him.

¶ 3 For the reasons that follow, we affirm.

¶ 4 Defendant's conviction arose from a May 20, 2009, shooting in the parking lot of a Calumet City night club that left Michael Johnson and Edward White dead and Albert Wills injured. Following his arrest, defendant was charged by indictment with 16 counts of first degree murder, 4 counts of attempted first degree murder, 1 count of aggravated battery with a firearm, and 1 count of aggravated battery. Prior to trial, defense counsel filed, *inter alia*, a motion *in limine* to preclude statements made by a witness named Raymond McCoy that he was afraid of defendant. The State indicated it had no objection and the motion was granted. The State proceeded to trial on two counts of intentional murder and two counts of strong probability murder, and nol-prossed the remaining counts.

¶ 5 At trial, Albert Wills testified that on the night in question, he went to Laristo's night club in Calumet City with a group of friends that included Edward White. Michael Johnson, with whom Wills was also friends, was working at Laristo's that night as a promoter. At some point that evening, White pointed out defendant to Wills. Wills had never seen defendant before that night and did not know his name. He identified defendant in court.

¶ 6 When the club closed, Wills and White went out to the parking lot and sat on the trunk of Wills's car. At some point, Wills noticed that a group of people who had come out of the club were starting to surround White's brother. Wills and White walked up to the circle of people.

Although they were on the outside of the throng, Wills could hear defendant arguing loudly and White's brother laughing. In Wills's opinion, defendant was antagonizing the group, "trying to get people riled up, trying to get something started."

¶ 7 The next thing Wills remembered was hearing a gunshot. He and White ran around the side of the club to an area between a parked car and the outer wall of the building to get away from the shooting. Wills was crouched by the trunk and White was in front of him. Wills looked up and saw defendant come around the front of the car and start shooting. Defendant was about three feet from White and five feet from Wills. After one or two shots, Wills "jumped" behind the trunk of the car. He heard about four or five more shots. After the shooting stopped, Wills saw defendant running away. Wills checked on White, who was conscious but in bad condition, and called 911. Eventually, paramedics arrived and took White away from the scene. Wills then realized he had been shot in the ankle. He went to the hospital by ambulance.

¶ 8 After Wills was treated and released, he went to the police department and told the police what happened. There, he viewed surveillance tapes depicting the shooting. He also viewed a lineup in which he identified defendant. When asked in court if there was anything "different" about defendant in the lineup, Wills answered, "The night of the shooting he had a ponytail and in the lineup he had braids and he also -- the night of the shooting he also had a gray collar shirt and in the lineup he had a blue shirt." Wills explained that when he identified defendant in the lineup, he was looking at defendant's face.

¶ 9 In court, Wills viewed surveillance videos of the club's parking lot. He identified defendant in the videos, stating that defendant's hair was in a ponytail, that he was wearing a gray polo shirt, and that he was holding a black gun. Wills also identified defendant standing in

front of a car as he and White were on the left side of the car. When Wills was shown stills from the videos, he identified defendant holding a gun in his hand and shooting. Wills stated that during the entire incident, he did not see anyone other than defendant with a gun.

¶ 10 On cross-examination, Wills reiterated that he had never seen defendant before White pointed him out inside the club. At the time of the shooting, defendant was about 10 feet from Wills. Nothing was obstructing Wills's view. Defendant was wearing a gray polo shirt and, although Wills could not remember whether he could see defendant's forearms, he did see defendant's face. Wills also clarified that, at the police station, he viewed the lineup before he viewed the surveillance tapes of the shooting. Wills opined that, in the video, the shooter's shirt was gray, not blue. He did not see any writing on the shirt in the video and did not recall whether he saw any writing on the shirt at the time of the shooting. Wills agreed that he gave the police a description of the shooter, but did not recall whether he told the police that the shooter had facial hair or tattoos on his arms. He also did not recall whether the shooter was wearing a big watch.

¶ 11 Ashia Sprouse testified that on the night in question, she was at Laristo's night club because Johnson, who was her friend, had invited her to a party he was promoting. After the club closed around 2 a.m., Sprouse stayed in the parking lot, near the club's front door, talking and socializing. At some point, an argument broke out in the parking lot that involved White and White's brother, both of whom were also Sprouse's friends, and defendant. Sprouse did not know defendant at the time, but identified him in court.

¶ 12 Sprouse testified that defendant lifted up his shirt, which was a gray polo. When he did this, she could see a gun in his waistband. The argument among the group continued. Johnson came outside to try to diffuse the situation. He approached defendant and his "people," telling

them and everyone else to go to their cars. At some point, defendant started shooting. Sprouse stepped into the club's vestibule. Through the vestibule's glass door, she saw defendant shoot White. There was nothing blocking her view of the shooting. She described what happened as follows: "I saw the defendant go behind the vehicle. [White] was facing me. He didn't see [defendant] coming from behind. And I seen him shooting him right behind him and he [was] looking dead at me in the glass and I couldn't tell him. And that's what I saw." Sprouse did not see where defendant went after he shot White.

¶ 13 Shortly thereafter, Sprouse saw Johnson walking toward the entrance of the club, where she was still standing in the vestibule. Johnson had blood on his shirt, which was white, and was holding his chest. He made it inside, but fell. Sprouse stayed with Johnson for a while, but then went outside to where White was on all fours, bleeding from his back and not moving. White told Sprouse he was okay, so she went back inside to check on Johnson. Johnson was not talking and was "not good."

¶ 14 Later that morning, Sprouse went to the police department and told them what she knew. She also viewed a lineup, in which she identified defendant as the person who shot White. When asked why she picked him out, Sprouse stated, "Because I remember his face." Sprouse testified that defendant was the only person she saw with a gun on the night in question.

¶ 15 During her testimony, Sprouse viewed surveillance videos of the parking lot. She pointed out defendant in the video, stated he was wearing a gray polo shirt, and agreed he had a gun in his hand.

¶ 16 On cross-examination, Sprouse explained that she had seen defendant inside the club on the night in question, but admitted she had "not really" paid much attention to him at the time.

She stated that when defendant lifted his shirt, she told her friends not to "mess with him" and that he had a gun. She agreed that she was concerned about him having a gun, and that her concern led her to watch defendant and pay attention to what he did. She did not see tattoos on his arm and did not recall whether there was any writing on his shirt. Sprouse did not tell the police whether defendant had facial hair. When shown pictures of the lineup she viewed at the police station, Sprouse agreed that defendant had tattoos on his arm and a beard. Sprouse also agreed that while she was in the parking lot, she heard a woman with blond hair yelling, "Shoot them niggers." However, she denied having seen that woman fire a gun into the air and denied having told officers on the scene that she saw the woman do so.

¶ 17 On redirect examination, Sprouse stated that she never told the police that defendant did not have tattoos or that he was clean-shaven.

¶ 18 Randy Malone testified that he was working as a manager and bartender at Laristo's on the night in question. Right around closing time, he was behind the bar with Johnson, looking at a monitor that showed video footage of the parking lot. Johnson noticed on the monitor that people were gathered outside and told Malone he was going to go to the parking lot to try to get them to disperse. Johnson then went outside while Malone went to the vestibule. From the vestibule, Malone heard Johnson tell the people in the parking lot that it was time for them to go. Then, through the vestibule's glass door, Malone saw a man who was about four or five feet from Johnson raise his left hand while holding an object that Malone believed was a gun. Malone, who was approximately seven feet from the man, described him as light-skinned, with his hair in a ponytail, and wearing a gray shirt. More than three shots rang out and Malone got down on the ground.

¶ 19 After the shooting stopped, Malone called 911. He then went outside and saw Johnson limping toward the door of the club. Malone and some other people brought Johnson inside, where he passed out. Eventually, paramedics and the police arrived. Later that day, Malone went to the police station and told the police what he saw. He also viewed a lineup, in which he identified defendant as the man he saw raising the object he believed was a gun. Malone was unable to identify defendant in court.

¶ 20 On cross-examination, Malone stated that he had seen the shooter inside Laristo's during the course of the night, but had not seen him there on prior evenings. He did not recall whether he told the police that the shooter had facial hair. He did not tell the police that the shooter had tattoos, as he was not looking for them, and did not notice whether the shooter was wearing a watch. He did not recall whether the shooter's gray shirt had writing on it. Malone did not see anyone else shooting in the parking lot and did not see any shell casings in the parking lot prior to the shooting. When asked whether he witnessed any of the shooting after he ducked down in the vestibule, Malone answered, "After I ducked down, I was able to I recall witness [*sic*] the first shot. And after that, I just totally blacked out." Malone acknowledged that he gave the police the DVR with all the surveillance recordings of the parking lot, but clarified that he did not watch any of the video footage at the police station until after he viewed the lineup. When he identified the shooter in the lineup, he informed the police that his hair and shirt were different from when he committed the shooting.

¶ 21 Jerome Elliott testified that on the night in question, he was working as a bouncer at Laristo's. Around closing time, Elliott noticed on the video monitors that a crowd of people was congregating outside in front of the door. Johnson said he was going to see what was going on

and went outside. Through the vestibule's glass door, Elliott saw Johnson walk toward the crowd with his hands extended and palms out and open. When Johnson got up to the crowd, someone pulled a gun and started shooting. Elliott, who was about five to ten feet from the shooter, described him as a man in a gray polo. Johnson ran. Two other men in the parking lot ran and took cover by a car, in a "fetal position," but the shooter ran up to them and opened fire. After about five or six shots, the shooter ran off. Shortly thereafter, Johnson came back inside the club. He had been shot and was bleeding from his chest. Elliott got Johnson to sit down and put pressure on his wound, and then called for an ambulance.

¶ 22 Later that day, Elliott went to the police station and viewed a lineup. In that lineup, he identified defendant as the shooter. However, defendant's hair and shirt were different from the time of the shooting. In the lineup, he was wearing a blue shirt, and his hair was braided rather than in a ponytail. Elliott was unable to identify defendant in court.

¶ 23 On cross-examination, Elliott stated that he had never seen the shooter before the night of the shooting. He agreed that he never told the police that the shooter had facial hair or tattoos or was wearing a watch. Elliott stated that he patted the shooter down on his way into the night club, but he did not find a weapon and did not notice whether he had any tattoos. On re-direct, Elliott agreed that he never told the police the shooter was clean-shaven, did not have tattoos, or was not wearing a watch. He also stated it was possible he missed the gun during the pat-down.

¶ 24 Raymond McCoy testified that on the night in question, he went to Laristo's night club with a friend. He stayed until the club closed and arranged to get a ride home with Eugene Hall, who was defendant's father. McCoy had known Hall and defendant for over 12 years, and identified defendant in court.

¶ 25 When McCoy walked out to the parking lot at closing time, he observed an "altercation, a group of guys in a huddle, in a circle talking." Defendant, who was wearing a gray shirt with a collar, was talking to a few of the men who were in the circle. Two or three minutes later, defendant fired a gun. McCoy hit the ground. He stated that "[i]t was a lot of people shooting that night," reiterated that defendant was one of the people he saw shooting, and said that while he did not see anyone else with a gun, he heard "a lot of gunshots behind it." When the gunshots stopped, McCoy and Hall got into Hall's van. Two or three minutes later, defendant and "a couple more guys" whom McCoy did not know got in the van. Hall was the driver; McCoy, defendant, and a man McCoy referred to as "Mike" were in the back; and a fifth man was in the front passenger seat. Hall drove off, but then returned to Laristo's parking lot within a minute because defendant wanted to find some keys. McCoy saw people holding up a man, who was wearing a white shirt and white hat and had been shot, and helping him into the club.

¶ 26 When Hall pulled out of the parking lot a second time, the van was stopped by the police. Mike jumped out of the van and fled on foot. McCoy did not know whether Mike had anything in his hands at that time, and denied that anyone had handed Mike anything while they were in the van. The police got everyone else out of the van.

¶ 27 Eventually, McCoy was taken to the police station, where he talked to investigators and signed "some papers." When shown a written statement in court, McCoy acknowledged that someone had read it to him, that he made and initialed changes to it, and that he had signed each page. He agreed that in the statement, he had related that he heard the sound of a gun being cocked, turned toward the sound, and saw defendant pointing a gun at the man in the white shirt and white hat. He also agreed that in the statement, he related he had seen defendant standing

between two cars parked alongside the building, firing a gun, but did not see at whom defendant was firing at that time.

¶ 28 On cross-examination, McCoy testified that defendant was one of five brothers who were all "very similar looking." One of the brothers, Josh, was at Laristo's on the night in question. McCoy stated that he signed the written statement about 36 hours after he was arrested, and that once he signed it, he was let go. When McCoy first got to the police station, he talked to the "task force" and told them he did not see the shooting. The police then came and talked to him four or five times, and a task force officer suggested three times that he, McCoy, may have been the shooter. McCoy agreed that it was "only after 36 hours of you being held in custody that a state's attorney takes a written statement from you that you then change and say it's [defendant]" and it was "only after a state's attorney, who you knew could prosecute crimes, came to see you that you signed the statement saying it's [defendant]." A few months before trial, and again the day before trial, he told two state's attorneys and a police officer that he did not see defendant shooting, but they told him he was lying. They told him if he got on the stand and lied, it would be perjury. Because perjury is a crime, McCoy thought he might go to jail, so he testified that defendant was the shooter.

¶ 29 On redirect examination, McCoy agreed that in the written statement, he said he was standing right next to defendant when defendant shot the man in the white shirt and white hat. He agreed that it was not defendant's brother Josh or another of defendant's brothers. McCoy also agreed that he had not met with the assistant state's attorneys the day before trial. Rather, they met two days before trial and no one called him a liar that day. When pressed, McCoy said that "the time before that," the prosecutor called him a liar regarding the gray shirt. McCoy

acknowledged that there was "one whole section" of the written statement that was crossed out because he did not agree with it. When asked whether he could have "done the same thing" with the portion of the statement in which he related that defendant was the shooter, McCoy answered, "Yes, but it was a lot going on at the time."

¶ 30 Assistant State's Attorney Andrea Grogan testified that she took McCoy's statement and reduced it to writing. She stated that at the time of the statement, McCoy was acting appropriately, and was coherent, friendly, and cooperative. As Grogan wrote out the statement, McCoy made corrections, which he initialed. McCoy also signed the bottom of each page. McCoy did not complain about being mistreated by the police.

¶ 31 Calumet City police officer Donielle Redwanc testified that around 2 a.m. on the day in question, she responded to a call of shots fired and shooting victims at Laristo's. As she approached the club's driveway entrance in her squad car, a white van was attempting to pull out of the lot and almost struck her. Some men standing outside the club's doors were pointing, waving, and yelling, "That's them, that's them." Redwanc activated her lights and curbed the van, which had travelled less than 30 feet. Redwanc was behind the van with her spotlight activated, illuminating its interior, and another officer, Robert Jones, pulled in front of the van and shone his spotlight into the van's front windshield.

¶ 32 Redwanc saw the front passenger door of the van open. A man wearing a gray polo shirt emerged holding some items in his hand in "almost a football carry." The man, later identified as Michael Nichols, fled on foot. Jones and other officers on the scene gave chase, and the van took off. Redwanc put a description of the van and its direction of travel over the air and followed it in her squad car. When the van stopped four or six blocks later, the four men inside were ordered

out and taken into custody. In court, Redwanc identified one of the passengers as defendant. She stated that when he was removed from the van, he was wearing a gray polo shirt and a large chain and medallion. When shown a photograph of the four men who had been removed from the van, Redwanc stated that it truly and accurately depicted how they looked at the time of arrest, except that defendant was wearing a different shirt. Redwanc related that the driver of the van was Eugene Hall, and that the two other passengers were McCoy and a man whose last name was Covington.

¶ 33 On cross-examination, Redwanc explained that when she was behind the van with her spotlight activated, she could see that the van's occupants were moving around, but did not specifically see defendant do anything. She did not recall whether there was any writing on the gray polo shirt defendant was wearing. When shown a photograph of a gray polo shirt with an "Ecko logo" on it, Redwanc could not say whether it was the shirt defendant was wearing at the time of his arrest.

¶ 34 Calumet City police officer Robert Jones testified that as he was responding to the call of shots fired at Laristo's, he saw Redwanc stopping a van. Jones pulled up in front of the van and shone his squad car's spotlight into it, illuminating the inside. Jones saw a man in the back seat of the van pass two guns to Nichols, who was in the front passenger seat. Nichols jumped out of the van and, cradling the guns, started running. Jones pursued Nichols in his squad car. When Jones hit Nichols, Nichols fell and dropped the guns, but got up and started running again. Jones then pursued Nichols on foot and eventually caught up with him. As another officer placed Nichols under arrest, Jones went back to the guns and stayed with them until another officer took over that duty.

¶ 35 On cross-examination, Jones acknowledged that he could not tell which back-seat passenger handed Nichols the guns. He could not see that passenger's shirt and did not recall whether that passenger was on the left or right side of the van.

¶ 36 Dr. Adrianne Segovia, a medical examiner, testified that she conducted autopsies on White and Johnson. According to Segovia, Johnson was shot through the chest and died as a result of that gunshot wound. The manner of death was homicide. White was shot four times: on the right side of the back, the left side of the back, the left upper outer arm, and the outer right thigh. Segovia testified that White died as a result of multiple gunshot wounds and that the manner of death was homicide. Segovia also testified that she recovered three bullets from White's body. One was recovered from White's left shoulder blade and corresponded with the gunshot wound to the left side of White's back. The other two bullets were recovered from White's right buttock and were surrounded by scar tissue. On cross-examination, Segovia opined that the two bullets recovered from White's buttock had entered his body weeks or months before his death.

¶ 37 Calumet City police sergeant Kevin Rapacz testified that around 4 a.m. on the day in question, he went to Laristo's to recover two handguns. Rapacz photographed the guns, secured them in a box and sealed them, and placed them into evidence. One of the guns, a CZ .40 caliber, had one live round in the chamber and one live round in the magazine. The other, a .40 caliber Glock 22, had no ammunition in it. On cross-examination, Rapacz stated that his commanding officer did not ask him to swab the guns for DNA evidence, and that he did not make any requests that gunshot residue tests be done on defendant.

¶ 38 Patrick Dwayne Phillips, an Illinois State Police crime scene investigator, testified that he investigated and photographed Laristo's parking lot. He found and collected 31 spent shell casings, three fired bullets, and one bullet fragment. Phillips submitted all these items, plus items he had received from the victims' autopsies, to the laboratory for analysis.

¶ 39 Nicole Fundell, a forensic scientist with the Illinois State Police Forensic Science Laboratory specializing in firearm and tool mark examination, tested the recovered guns, shell casings, and bullets. She testified that of the 31 fired cartridge cases, 7 were fired from the recovered Glock and 6 were fired from the CZ. The remaining shell casings were fired from three unidentified guns. Five bullets examined by Fundell – two of the three recovered at the scene and all three recovered from White's body – were fired from the Glock.

¶ 40 Barbara Wilkins, an expert in latent fingerprint examination with the Illinois State Police Forensic Science Command, analyzed both recovered guns. She was unable to recover prints suitable for testing from either gun. On cross-examination, she agreed that she had not tested any shell casings, fired bullets, or bullet fragments for fingerprints.

¶ 41 Calumet City police officer Mitch Growe testified that he conducted the lineups viewed by Elliott, Malone, Wills, and Sprouse, all of whom identified defendant. Elliott, Malone, and Wills all commented on defendant's hair and shirt being different in the lineup. Sprouse also said his hair was different, and commented that she would never forget his face. Malone "picked [defendant] right away." Sometime after conducting the lineups, Growe watched surveillance videos of the cell block depicting defendant when he was first brought in, wearing a gray polo shirt, with his hair in a ponytail. In the video, defendant removed his watch, earrings, shoes, and a large medallion. Another video from a short time later depicted a hand reaching out of

defendant's cell with a blue shirt. A third video clip showed defendant being removed from the cell for the first time, wearing a blue t-shirt.

¶ 42 Growe testified that sometime before he conducted the lineups, a detention aide came to him and showed him a gray shirt with writing on it. According to Growe, it was not the same shirt defendant had, but he secured it for evidence nonetheless.

¶ 43 On cross-examination, Growe admitted that the police were never able to locate the gray shirt defendant was wearing when he arrived at the station, even though he never left his cell. When asked how the shirt disappeared, Growe answered that he could only speculate. Growe also acknowledged that he did not request a gunshot residue test be conducted on defendant, and did not request any testing on defendant's various belongings.

¶ 44 On re-direct, Growe stated that, for prisoner privacy, no video recording is made of the inside of cells. Growe also stated that he had known prisoners to flush things down the toilet in the cells. Nothing was recovered from the toilet of the cell defendant was in. On re-cross, Growe stated that he and other officers "always wondered what happened to the shirt" and "surmised it possibly would have been shredded, ripped up, and flushed," although he had no evidence to support that theory.

¶ 45 Defendant made a motion for a directed verdict, which the trial court denied.

¶ 46 Defendant presented two stipulations. First, that if called as a witness, Calumet police lieutenant Tim Murphy would have testified that when he interviewed Sprouse on the day of the shooting, she told him she observed a black woman in a blond ponytail or weave pull out a gun and shoot several guns into the air. Second, that if called as a witness, Calumet police officer R. Freida would have testified that when he and another investigator interviewed Wills at the

hospital on the day of the shooting, Wills did not give them a height or weight description of the shooter and did not tell them that the shooter had facial hair or tattoos on his arms. The State agreed to the stipulations.

¶ 47 Following closing arguments and instructions, the jury found defendant guilty of the first degree murders of Johnson and White, and found that defendant personally discharged the firearm that proximately caused their deaths.

¶ 48 Defendant filed a motion for a new trial and an amended motion for a new trial. The trial court denied the motions. Subsequently, the court sentenced defendant to natural life in prison. Defendant's motion to reconsider sentence was denied.

¶ 49 On appeal, defendant first challenges the sufficiency of the evidence. When reviewing the sufficiency of the evidence, the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). The credibility of the witnesses, the weight to be given their testimony, and the resolution of any conflicts in the evidence are within the province of the trier of fact, and a reviewing court will not substitute its judgment for that of the trier of fact on these matters. *People v. Brooks*, 187 Ill. 2d 91, 131 (1999). The testimony of a single witness, if positive and credible, is sufficient to convict. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 228 (2009). Reversal is justified only where the evidence is "so unsatisfactory, improbable or implausible" that it raises a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307 (1989).

¶ 50 Defendant asserts that where "incredible and unreliable" eyewitness identifications were the only direct evidence against him, the State failed to prove beyond a reasonable doubt that he

was the person who shot and killed White and Johnson. Defendant argues that witnesses described the shooter as a light-skinned black man wearing a gray polo shirt and a ponytail; gave no height, weight, or age description; and failed to notice whether the shooter had facial hair, had tattoos on his arms, or was wearing ostentatious jewelry. He asserts that the lineup identifications of him were entirely unreliable in that the witnesses' descriptions of the shooter were "practically non-existent," their opportunities to observe the shooter were extremely poor, and characteristics of his own appearance that would have been obvious on the shooter, such as facial hair, tattoos, and jewelry, went unnoticed. Defendant further argues that the weakness of the lineup identifications is exemplified by the fact that two of the eyewitnesses could not identify him in court; that McCoy, the only witness who knew him prior to the shooting, recanted his identification at trial; and the only physical evidence was inconclusive ballistics evidence that tied five different guns to the shell casings found on the scene, and contradictory evidence about the origin of the bullets recovered from White. Finally, defendant highlights that he and his clothes were never tested for gunshot residue, no DNA testing was performed on any of the evidence, no fingerprints were found on the recovered guns, and the shirt he was wearing at the time of arrest disappeared.

¶ 51 To assess identification testimony, this court applies the factors set out by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). *People v. Branch*, 2018 IL App (1st) 150026, ¶ 25. Those factors are: (1) the opportunity that the witness had to view the offender at the time of the offense; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the offender; (4) the level of certainty demonstrated by the witness at the identification; and (5) the length of time between the crime and the identification. *Id.*

¶ 52 We find that for each of the four witnesses who identified defendant in a lineup, the majority of the *Biggers* factors favor the State in this case.

¶ 53 First, Wills, Sprouse, Malone, and Elliott all had sufficient opportunity to observe the shooter. Wills testified that while he was inside the club, White pointed out defendant to him, and that he later saw defendant arguing with White's brother outside the club. Then, when Wills was crouched behind the car with White, he looked up and saw defendant, who was only about five feet from him, shoot him and White. Sprouse, like Wills, saw defendant inside the club, and then outside, arguing with White's brother in the parking lot. She then watched through the vestibule's glass door, with nothing blocking her view, as defendant shot White. Malone saw defendant in the club during the course of the night. At the time of the shooting, Malone was in the vestibule with Sprouse, looking through the glass door. He saw defendant, who was about seven feet from him, raise a gun near Johnson and shoot several times. Finally, Elliott patted defendant down on his way into the club. Then, when he was in the vestibule about 5 to 10 feet from defendant, Elliott saw defendant pull a gun, start shooting as Johnson walked toward him, run up to White and Wills, and shoot them about five or six times. While the encounters these four witnesses described may have been brief, the brevity of a witness's observation does not undermine his or her identification testimony. *People v. Barnes*, 364 Ill. App. 3d 888, 894 (2006). We find all four witnesses had ample opportunity to observe the shooter.

¶ 54 As to the second factor, we disagree with defendant's assertion that all four of the witnesses' degree of attention "had to have been low" because they were all in crouched positions and hiding, they did not notice his facial hair, tattoos, or jewelry, and their focus on the gun would have reduced their memories of other details of the crime. Contrary to defendant's

position, we find that the second *Biggers* factor weighs in favor of the State. Here, Wills, Sprouse, Malone, and Elliott all gave detailed accounts of defendant's actions, and the actions they described were corroborated at least in part by the surveillance video footage. All four witnesses also noted defendant's gray polo shirt, and all but Sprouse testified that defendant's hair was in a ponytail. Where a witness's testimony is detailed and descriptive and indicates that he or she was acutely aware of what was happening during the encounter, a court may find that the witness's degree of attention was sufficient to render his or her identification of the defendant reliable. *In re J.J.*, 2016 IL App (1st) 160379, ¶ 30; see also *Branch*, 2018 IL App (1st) 150026, ¶ 26 (testimony regarding details demonstrates a high degree of attention at the time of a shooting).

¶ 55 Moreover, the positive identification of an accused can be sufficient even if the witness gives only a general description of an offender. *Slim*, 127 Ill. 2d at 309. Thus, even though none of the witnesses specifically told the police about defendant's facial hair, tattoos, or jewelry, that does not mean their degree of attention was low. With regard to the gun, this court has noted that "there is a tendency of [witnesses] to focus on weapons rather than the offender's face." *J.J.*, 2016 IL App (1st) 160379, ¶ 30. However, where, as here, the witnesses are still able to be "detailed and descriptive," and video of the incident corroborates details remembered by the witnesses, the effect of a gun's presence is minimized. *Id.*; see also *People v. Macklin*, 2019 IL App (1st) 161165, ¶ 66 (Hyman, J., dissenting). Finally, we note that although it is true Wills was crouched down behind a car, attempting to hide while defendant was shooting at him and White, and that Malone "ducked down" in the vestibule after he witnessed the first shot, the record does not support defendant's assertion that the other two eyewitnesses were crouched or

hiding. Rather, they were in the club's vestibule, which had a glass door through which they had an unobstructed view of the parking lot.

¶ 56 The third *Biggers* factor is the accuracy of any prior descriptions provided. *Biggers*, 409 U.S. at 199. We find this factor to be neutral. At trial, defense counsel elicited testimony from Wills, Sprouse, Malone, and Elliott regarding descriptive details they did *not* give the police, namely, that the shooter had facial hair, tattoos, and jewelry. But nothing in the record reveals what kind of description the witnesses *did* give the police, other than stating that the shooter was light-skinned, with a ponytail, and wearing a gray polo shirt. Without knowing any further details of what the witnesses' prior descriptions of the shooter were, we cannot say whether those descriptions were accurate or not.

¶ 57 The fourth *Biggers* factor is the level of certainty demonstrated by the witness at the identification. *Biggers*, 409 U.S. at 199. As defendant accurately observes, none of the four eyewitnesses admitted to being uncertain of their lineup identifications. In fact, Wills and Sprouse both testified that they identified defendant by looking at his face, and Officer Growe noted that Malone "picked [defendant] right away." There is no evidence that any of the four witnesses wavered in their identification. While neither Malone nor Elliott was able to identify defendant in court, the fact that a witness does not positively identify a defendant at trial simply affects the weight the trier of fact will give the prior identification. *People v. Herrett*, 137 Ill. 2d 195, 204 (1990). We find that the fourth *Biggers* factor weighs in favor of the State. As for defendant's argument that a witness's confidence in his or her identification is "essentially worthless," we note that he has cited no authority from Illinois doing away with the fourth *Biggers* factor. As such, we find his argument unpersuasive.

¶ 58 The fifth and final *Biggers* factor is the length of time between the occurrence and the identification. *Biggers*, 409 U.S. at 199. Here, all four eyewitnesses identified defendant in a lineup within a day of the shooting. This short time frame favors the State. *People v. Simmons*, 2016 IL App (1st) 131300, ¶ 97 (finding a one-week and a two-week delay between crime and identification a "relatively short time").

¶ 59 Where the majority of the *Biggers* factors weigh in favor of the State, we do not find the identifications made by Wills, Sprouse, Malone, and Elliott "so unsatisfactory, improbable or implausible" as to create a reasonable doubt as to defendant's guilt. *Slim*, 127 Ill. 2d at 307. Defendant's challenge to the sufficiency of the evidence on this basis fails.

¶ 60 McCoy's identification of defendant differs from the other eyewitnesses, as he knew defendant prior to the night of the shooting and was a fellow passenger with him in the van. Defendant makes much of the fact that McCoy "recanted" his identification of defendant at trial. After reviewing the record, we find that McCoy's testimony does not present a simple recantation. At trial, McCoy testified that while "[i]t was a lot of people shooting that night," he did not see anyone other than defendant with a gun. McCoy also acknowledged that in his written statement, he related that when he heard the sound of a gun being cocked, he turned and saw defendant pointing a gun at a man in a white shirt and white hat, and also that he saw defendant standing by two cars parked alongside the building, firing a gun. While McCoy testified on cross-examination that he only signed his written statement after being held in custody for 36 hours and that he testified as he did on direct because he did not want to go to jail for perjury, he never directly denied his identification of defendant as Johnson's and White's shooter.

¶ 61 Even if we were to consider McCoy's testimony a recantation, we note that recantations are considered inherently unreliable. *People v. Evans*, 2017 IL App (1st) 143268, ¶ 41. Moreover, where Wills, Sprouse, Malone, and Elliott all reliably and positively identified defendant as the shooter, the value of McCoy's identification was minimal. We cannot find that the flaws in McCoy's testimony render the evidence against defendant "so unsatisfactory, improbable or implausible" as to create a reasonable doubt as to defendant's guilt. *Slim*, 127 Ill. 2d at 307.

¶ 62 Defendant's arguments regarding the physical evidence also do not persuade us. As noted above, testimonial evidence, if positive and credible, is sufficient to convict. *Siguenza-Brito*, 235 Ill. 2d at 228. Thus, the absence of fingerprint, DNA, and gunshot residue evidence, and even the absence of the shirt defendant was wearing at the time of the shooting, is of no importance in this case. See, *e.g.*, *People v. Bennett*, 154 Ill. App. 3d 469, 475 (1987) ("[T]he lack of fingerprint evidence does not necessarily raise a reasonable doubt as to guilt," rather, "it is unnecessary and cumulative where there is eyewitness testimony."). We further note that the testimonial evidence in this case was corroborated by the surveillance video footage, defendant's flight from the scene in a van, and the presence in that van of the gun that was used to shoot White. Further corroboration was provided by defendant's efforts to alter his appearance between the time of arrest and the time of the lineups by changing his shirt and hairstyle. See *People v. Clark*, 335 Ill. App. 3d 758, 767 (2002) (change in a defendant's appearance may indicate consciousness of guilt).

¶ 63 With regard to the three bullets recovered from White's body, we agree with defendant that the witnesses' testimony was inconsistent. The medical examiner testified that White was

shot twice in the back, once in the arm, and once in the thigh. She recovered a bullet from White's left shoulder that corresponded with the gunshot wound to the left side of his back. The other two bullets she recovered were in his right buttock, where he had not been shot on the day in question. These two bullets were surrounded by scar tissue, and had, in the opinion of the medical examiner, entered his body weeks or months before his death. However, the firearm and tool mark expert testified that all three bullets recovered from White's body had been fired from the Glock that was recovered by officers responding to the scene.

¶ 64 As noted above, the resolution of any conflicts in the evidence is within the province of the trier of fact, and a reviewing court will not substitute its judgment for that of the trier of fact on these matters. *Brooks*, 187 Ill. 2d 91, 131 (1999). In closing, defense counsel argued to the jury that the conflict between the medical examiner's testimony and the firearm expert's testimony was "ridiculous." As such, the jury was well aware of the conflict and apparently resolved it in favor of the State, as was its prerogative as the trier of fact. *People v. Williams*, 2015 IL App (1st) 130097, ¶ 29. Viewing the evidence in the light most favorable to the State, we do not find the evidence to be so improbable, unsatisfactory, or unconvincing as to raise a reasonable doubt of defendant's guilt. *Slim*, 127 Ill. 2d at 307.

¶ 65 Defendant's second contention on appeal is that he was denied a fair trial because in closing argument, the State (1) improperly commented on his failure to testify and thus shifted its burden to him to prove his innocence; and (2) improperly informed the jury that witnesses were afraid of him, when there was no evidence directly connecting such alleged fear to defendant's conduct.

¶ 66 With regard to defendant's claim that the State improperly commented on his failure to testify and improperly shifted the burden of proof, the comment made by the prosecutor in closing was as follows:

> "Let's talk about the things that you have heard from that witness stand that says he's innocent. That's it. We're done. Nothing from that witness stand gave you any credence that [defendant] is innocent. Witness, after witness, after witness, after witness, after witness identified him, [defendant] (indicating), as the person who shot Michael Johnson, Edward White and Albert Wills."

Defendant did not object when the prosecutor made this comment and did not include the issue in a posttrial motion. Acknowledging that the issue is unpreserved, defendant nevertheless argues that this court may address it as a matter of plain error.

¶ 67 Ordinarily, a defendant must both object at trial and include the alleged error in a written posttrial motion in order to preserve an issue for appeal. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). However, under the plain error doctrine, this court may reach an unpreserved issue when "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error," or when "(2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). The first step in plain error analysis is determining whether an error actually occurred. *People v. Cosby*, 231 Ill. 2d 262, 273 (2008). This is because absent error, there can be no plain error. *People v. Wooden*, 2014 IL App (1st) 130907, ¶ 10.

¶ 68 A prosecutor has wide latitude in making closing arguments and is permitted to comment on the evidence and any fair and reasonable inferences it yields. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). Remarks made during closing arguments will result in reversible error only when they "engender 'substantial prejudice' against the defendant to the extent that it is impossible to determine whether the verdict of the jury was caused by the comments or the evidence." *People v. Kirchner*, 194 Ill. 2d 502, 549 (2000) (quoting *People v. Macri*, 185 Ill. 2d 1, 62 (1998)). Challenged comments must be viewed in the context of the closing arguments as a whole. *Id.*

¶ 69 Defendant acknowledges that the State may comment on the uncontradicted nature of its case. He argues that here, however, the prosecutor improperly contrasted his failure to present evidence of his innocence with the State's presentation of five occurrence witnesses. Defendant asserts that the prosecutor's comment singled out and blamed him for his failure to testify and enlighten the jury, and shifted the burden of proof to him by implying that he needed to establish that he was not guilty.

¶ 70 Criminal defendants have a constitutional right not to testify. *People v. Kliner*, 185 Ill. 2d 81, 156 (1998). When a criminal defendant exercises this right, the State cannot comment on his decision. *Id.* It is improper if the State "point[s] the finger of blame directly at the defendant for his failure to testify." *People v. Mills*, 40 Ill. 2d 4, 9 (1968). However, "the State is free to point out what evidence was uncontradicted so long as it expresses no thought about who specifically – meaning the defendant – could have done the contradicting." *People v. Keene*, 169 Ill. 2d 1, 21 (1995). That is, the State is permitted to remind the jury "the 'what' of the evidence [being] uncontradicted" without "stray[ing] into the 'who' of the issue." *Id.* at 22-23.

¶ 71 In this case, we find that the prosecutor clearly emphasized "what" was uncontradicted rather than "who" should have done the contradicting. The State argued, accurately, that "[w]itness, after witness, after witness, after witness, after witness identified" defendant. But the prosecutor did not mention in any way that defendant specifically could have offered a different account. Rather, the prosecutor stated generally that "nothing" from the witness stand indicated defendant was innocent. The State's witnesses and the videos established that a crowd of people was present at the time of the shooting, and defense counsel elicited testimony that at least one of defendant's brothers was among them. Thus, a large number of people – not just defendant himself – could potentially have provided evidence for defendant. In these circumstances, we cannot find that the prosecutor was expressing that defendant specifically could have, but failed to, contradict the State's case. We find no error. See *id.* at 22-23. As such, the plain error doctrine does not apply and defendant's contention remains forfeited.

¶ 72 Defendant's final contention is that in closing, the State improperly informed the jury that witnesses were afraid of him, despite there being no evidence connecting such alleged fear of his conduct. The State's comments were as follows:

> "The legislature, in their infinite wisdom, knew that sometimes people will say things right after a crime. They know by the time you come to trial, there might be different things. You might be good friends with the defendant, you might be family members of the defendant, *you might be afraid of the defendant*.
>
> [DEFENSE COUNSEL]: Objection.
>
> [ASSISTANT STATE'S ATTORNEY]: There could be all sorts of reasons.
>
> THE COURT: Overruled. It's argument.

[ASSISTANT STATE'S ATTORNEY]: There could be all sorts of reasons. I'm not telling you which one there is, but there could be all sorts of reasons on why people say things to the police and why they say something different at trial.

***

Finally, in terms of *** Randy Malone and Jerome Elliott, they did ID [defendant] that night. And when they came here today, they didn't see him [in court]. Again, [defendant] had changed his appearance. Well, he's different. I'm not saying he changed it, his appearance is different. *And it's possible that they were afraid*.

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled. It's argument.

ASSISTANT STATE'S ATTORNEY]: Well, it's easy to walk into a police station and identify somebody through a glass where they can't see you. It's not so easy to come into a courtroom and identify somebody that you saw murder two people, to stand here and have to identify him. That doesn't mean that their identification was wrong. They ID'd him that night." (Emphases added.)

¶ 73 Defendant's challenges to the two comments about witnesses being afraid were preserved for review. Defendant made contemporaneous objections to both comments, and included the first comment in his initial motion for a new trial. He did not include the second comment in either his initial or amended posttrial motions. In general, such a failure would result in forfeiture. See *Enoch*, 122 Ill. 2d at 186 ("*Both* a trial objection *and* a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial" (emphases in original)). However, a reviewing court may decline to apply the forfeiture rule

where the trial court had the full opportunity to review the defendant's claim of error, and where the defendant is not asserting on appeal a completely different objection from the one he raised before the trial court. *People v. Heider*, 231 Ill. 2d 1, 18 (2008).

¶ 74 Here, we find that the issue regarding the second comment was preserved for appellate review because the trial court reviewed the claim and ruled on it. When arguing for a new trial, defense counsel asserted that it was reversible error for the prosecutor to "bring up fear of any witness in [any] way, shape or form" in closing argument. The State responded that defense counsel, in his own closing argument, had brought out the fact that two of the witnesses were unable to identify defendant in court, and that the prosecution's comment in response was "not that they were afraid of this defendant, not that they were afraid because the defendant had threatened them, *** but that the procedure was intimidating. *** The procedure itself, not the defendant, Judge." Defense counsel replied that the State was "being creative" in asserting that its comment referred to the process being intimidating, rather than the witnesses being fearful of defendant.

¶ 75 The trial court ruled on the claim as follows:

> "Regarding the State's statement during closing arguments regarding fear as used and objected to by the defense, the court did make its appropriate rulings regarding it. It was matters which were not alleged that the defendant himself made any threats to anybody or anybody associated with the defendant made any threats to anyone. It was just any statement made regarding using those words in light of the evidence that was there, and as such, the court instructed the jury to rely only on the evidence that they heard and nothing extrinsic regarding it and arguments are not evidence. And the court

> continuously made those admonishments to the jurors during the course of any objections during closing arguments."

Thus, the trial court specifically addressed and rejected defendant's argument regarding the State's comments that it was possible witnesses were afraid. The trial court reviewed defendant's claim and defendant is not now asserting a completely different objection than the one he raised below. In these circumstances, we hold that the issue is not forfeited and we will consider the merits of defendant's claim. See *id.*; *People v. Patterson*, 392 Ill. App. 3d 461, 464 (2009) (reviewing an issue not raised in the posttrial motion, but fully considered by the trial court).

¶ 76 "The right to a fair trial includes the right to a verdict based solely on the evidence actually introduced at trial." *People v. Anderson*, 2018 IL App (1st) 150931, ¶ 24 (citing *Turner v. Louisiana*, 379 U.S. 466, 472-73 (1965)). Thus, a prosecutor has great latitude in closing argument and may argue fair and reasonable inferences drawn from the evidence, but may not argue facts that are not based on evidence in the record. *People v. Jackson*, 2012 IL App (1st) 102035, ¶ 18. Remarks made during closing arguments will result in reversible error only when they "engender 'substantial prejudice' against the defendant to the extent that it is impossible to determine whether the verdict of the jury was caused by the comments or the evidence." *Kirchner*, 194 Ill. 2d at 549 (quoting *Macri*, 185 Ill. 2d at 62). Challenged comments must be viewed in the context of the closing arguments as a whole. *Id.* Preserved claims of prosecutorial misconduct in closing arguments are reviewed for an abuse of discretion. *People v. Phagan*, 2019 IL App (1st) 153031, ¶ 54.

¶ 77 We find that the State's comments – both that a witness may say something different at trial because, among other things, he might be afraid of the defendant, and that Malone and

Elliott may have failed to identify defendant in court because, among other things, they may have been afraid – did not misstate the evidence, and that the trial court did not abuse its discretion in overruling defendant's objections to these comments.

¶ 78 Defendant argues that the prosecutor's first comment was made specifically with respect to McCoy, and introduced the notion that McCoy was afraid of defendant. However, the prosecutor's first comment did not explicitly name McCoy or suggest McCoy changed his story on the witness stand because defendant threatened or intimidated him. As a result, the prosecutor's comment was not prejudicial. See *People v. Davis*, 2018 IL App (1st) 152413, ¶¶ 71-72; *People v. Green*, 2017 IL App (1st) 152513, ¶ 89. In addition, the statement by the prosecutor included three possible reasons why a witness might change his story: friendship, familial ties, or fear. We find no error resulting from this hypothetical statement. See *Green*, 2017 IL App (1st) 152513, ¶¶ 86, 89 (no reversible error where the State posited three hypothetical reasons why a witness recanted, including "maybe because he's scared").

¶ 79 In the second comment, the prosecutor did not explicitly state that Malone and Elliott failed to identify defendant in court because defendant threatened or intimidated them. Further, after the trial court overruled defendant's objection, the prosecutor elaborated that it was "easy" to identify someone at a police station, but "not so easy" to do so in a courtroom. This follow-up comment supports the State's argument, made at the hearing on the posttrial motion and in its brief on appeal, that the prosecutor was commenting on courtroom procedure, as opposed to defendant, being intimidating. The prosecutor's comment was therefore not prejudicial. See *Davis*, 2018 IL App (1st) 152413, ¶¶ 71-72; *Green*, 2017 IL App (1st) 152513, ¶ 89.

¶ 80 Even taken together, the State's arguments did not, as defendant claims, portray him as a frightening person who intimidated witnesses. Viewed in the context of the closing arguments as a whole, we cannot say that the prosecutor's remarks, singly or taken together, engendered " 'substantial prejudice' against the defendant to the extent that it is impossible to determine whether the verdict of the jury was caused by the comments or the evidence." *Kirchner*, 194 Ill. 2d at 549 (quoting *Macri*, 185 Ill. 2d at 62). Accordingly, the trial court did not abuse its discretion in overruling defendant's objections to the prosecutor's remarks. Defendant's contention fails.

¶ 81 For the reasons explained above, we affirm the judgment of the circuit court.

¶ 82 Affirmed.