2017 IL App (5th) 140013-U

NO. 5-14-0013

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Lawrence County.
	)	
v.	)	No. 12-CF-41
	)	
TYLER R. McQUEEN,	)	Honorable
	)	Robert M. Hopkins,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE OVERSTREET delivered the judgment of the court.
Presiding Justice Moore and Justice Chapman concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction for first-degree murder is affirmed, as admitted testimony of postarrest conversation with jail officer was harmless and the trial court did not abuse its discretion in limiting defense's closing argument or in allowing into evidence graphic photographs of the victim.

¶ 2 Following a jury trial in the circuit court of Lawrence County, the defendant, Tyler R. McQueen, was convicted of first-degree murder, and the circuit court sentenced him to 50 years' imprisonment. On appeal from his conviction, the defendant argues that the circuit court abused its discretion by preventing him from arguing to the jury that the victim's niece had inflicted the victim's final, mortal wounds, thereby denying the defendant his sixth amendment right to counsel and to present a defense; that the circuit

court abused its discretion by permitting a jail officer to testify regarding his jail conversation with the defendant, and compounded the error by forbidding the defendant from presenting as substantive evidence the officer's prior inconsistent statement; and that the circuit court abused its discretion and deprived the defendant of a fair trial by allowing into evidence graphic photographs of the victim's body. For the reasons that follow, we affirm.

¶ 3 BACKGROUND

¶ 4 On March 30, 2012, the defendant was charged by information with three counts of first-degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2012)) for fatally stabbing Robert Westall with a knife. The evidence at the defendant's trial revealed that Helen Marie Westall solicited the defendant, who was 20 years old, to kill Robert, who was Helen Marie's 78-year-old uncle, in exchange for $10,000 and a blue 1995 Oldsmobile Cutlass Supreme vehicle. In a video-recorded interview with police, the defendant admitted that in the late evening hours of Friday, March 23, 2012, he entered Robert's home through a front window, fought with Robert over a knife, and stabbed Robert multiple times. Afterwards, the defendant drove Helen's vehicle, where he had stored a change of clean clothes, to a bridge over the Wabash River to dispose of his bloody clothing. Robert was later found dead in his apartment bedroom.

¶ 5 Debra Barekman, who had dated Robert for eight years, testified that she had last seen Robert on Friday, March 23, 2012, sometime before midnight. When she was later unable to contact him, she contacted neighbors to accompany her to the United Methodist Village where Robert stayed. On Sunday, March 25, 2012, Debra found Robert on the

bed in the guest room, with his throat slashed. Over objection, the State introduced exhibit 6, which depicted Robert with his mouth open and throat slashed, covered in blood. Debra testified that exhibit 6 depicted how Robert looked on the day she found him.

¶ 6 When Special Agent Tim Brown, with the Illinois State Police, reached the scene on Sunday, Robert was deceased, had many cuts on his body, had a deep cut on the right side of his neck, and was positioned on his back. Special Agent Brown also witnessed blood on Robert's doorknob. Eric Corey, a forensic scientist with the Illinois State Police, testified that bloodstains on the outside of Robert's back doorknob matched the defendant, while bloodstains from the inside of the doorknob matched Robert and the defendant. Steven Hulen, a crime scene investigator with the Illinois State Police, testified that Robert's window screen had been damaged and his phone service had been disabled. Hulen further testified that he witnessed a handprint in dust on the edge of Robert's night stand but was unable to acquire a fingerprint suitable for comparison purposes.

¶ 7 Special Agent Brown thereafter interviewed Helen Marie, who said that she may have been recorded on video surveillance at the United Methodist Village where Robert stayed. Helen Marie told Special Agent Brown that she may have been recorded on Thursday or Friday night, while scrunching down in a vehicle. Two days after Special Agent Brown's initial interview with Helen Marie, she telephoned him, yelling that he was going to arrest her and referencing the defendant's name. Special Agent Brown then participated in the defendant's 3½-hour interview.

¶ 8 During the defendant's video-recorded interview on March 30, 2012, the defendant stated that Helen Marie had told him that she wanted Robert dead because Robert had mistreated her aunt. The defendant stated that he had not known Robert but that he was scared Helen Marie would kill him if he did not kill Robert. The defendant stated that Helen Marie had driven him to Robert's place on Thursday, the day before Robert was killed. Later that evening, the defendant traveled to Vincennes, Indiana, with his friend, Dane Martin.

¶ 9 The defendant stated that on Friday, he and Helen Marie returned to Robert's place. A neighbor drove by the home while they were there, and he and Helen Marie ducked down to hide. The defendant stated that Helen Marie had directed him to enter through Robert's front window, where the window latch had been jimmied and the screen had been sliced. The defendant also stated that Helen Marie had told him to pull Robert's telephone wires so that Robert could not call for help, and he possibly had done so.

¶ 10 The defendant stated that later Friday evening, the defendant returned to Robert's place in Helen Marie's blue Oldsmobile vehicle. The defendant stated that before he left Helen Marie's home to go to Robert's, she had told him he better do it right or "his ass is next." The defendant stated that although Helen Marie indicated she was going to work, he believed work was a ruse and that she would follow him to Robert's.

¶ 11 The defendant stated that upon reaching Robert's home, he entered Robert's living room through the front window, and as he walked across the room, he heard Robert walk into the kitchen. The defendant stated that Robert saw him in the threshold of the hallway and ran after him into the bedroom. The defendant stated that he thereafter

struck Robert in the face to try to escape. The defendant stated that he and Robert wrestled to the floor, and Robert attacked him with a knife, saying that he was going to kill the defendant. The defendant stated that he grabbed Robert's wrist and told Robert to stop restraining him so he could explain. The defendant stated that he and Robert were between the window and the bed in the bedroom, and he was trying to push Robert off of his leg so that he could run away. The defendant stated that he pushed Robert off of him, and Robert fell onto the knife, piercing his own neck. The defendant stated that Robert was thereafter moving the knife towards him, and he was trying to push Robert's hand away. The defendant stated that Robert had one hand on his neck, and the defendant could feel blood on his chest. Noting cuts to his hands, the defendant stated that Robert continued to stab at the defendant but lost the knife in the floor. The defendant stated that he scrambled to acquire the knife and "started lashing out with the knife *** whipping around with the knife, not really aiming, just throwing" after Robert grabbed him by the throat. The defendant could not remember how many times he stabbed Robert with the knife, but eventually he wrenched his leg free and started to flee. The defendant stated that when he left the home, Robert was trying to stand, had "raspy breath," and had told the defendant he was going to kill him. The defendant stated that he did not move Robert's dead body.

¶ 12 The defendant stated that he threw the knife down in the kitchen and ran out the back door, leaving in Helen Marie's car. The defendant stated that he did not see Helen Marie and acknowledged that he did not know if Helen Marie had been at the scene at that time. The defendant stated that after throwing his bloody clothes in the river, the

defendant returned to Helen Marie's house, took a shower, and slept. The defendant stated that Helen Marie was not at her house when he returned about 5 a.m. and that he did not know where she was.

¶ 13 In an audio-recorded interview occurring about 11 a.m. on March 30, 2012, the defendant stated that he did not take a weapon to kill Robert because he "didn't intend on killing him." The defendant stated that he thought Helen Marie had followed him to the scene, but he did not know.

¶ 14 At trial, Dane, who had been convicted of felony theft in 2012 and was facing a second felony theft charge, testified that in March 2012, he and the defendant traveled to Vincennes together, and the defendant asked Dane, who had served in the army, if he had ever used his training for personal gain. Dane testified that the defendant relayed to him that the defendant had been hired by someone to "do a hit man job." Dane testified that the defendant had stated he had been asked to kill somebody and would be paid $10,000. Dane testified that the defendant had stated that during a hit job, he would choose to stab someone because it relieves a lot of frustration in that "you can take your anger out on somebody else." Dane testified that when the defendant asked him how to cut someone's throat, Dane answered that "[t]he way to actually do it is tilt the head forward, not to put a strain on the arteries and veins. So they don't have a chance to scream, you cut through the voice box, larynx and jugular and all veins. It doesn't make an arterial strain to make a mess. It kind of runs down the front of the shirt."

¶ 15 Dr. John Allen Heidingsfelder, a forensic pathologist, testified that Robert's autopsy revealed wounds to his neck, face, flanks, shoulders, hands, and leg. Dr.

Heidingsfelder testified that there were eight or nine stab wounds to Robert's right lower back region. Dr. Heidingsfelder testified that there was a moderate amount of hemorrhage in the tissues behind the abdominal cavity in that area, which indicated that Robert still had blood pressure when he received those stab wounds. Dr. Heidingsfelder testified that given how the stab wounds on the right flank were in close proximity to one another, Robert was likely incapacitated, restrained, or not moving very much as he was being stabbed.

¶ 16 Dr. Heidingsfelder identified a stab wound in the left side of Robert's back and another to the back of his left shoulder. Dr. Heidingsfelder detected a total of five stab wounds to Robert's left flank, which were associated with interstitial hemorrhage. Dr. Heidingsfelder testified that one stab wound in Robert's left flank entered into the back of his left kidney. Dr. Heidingsfelder testified that the injury to the kidney would not have caused immediate death. The State admitted over objection State's Exhibit No. 58, which depicted a kidney that had been pierced with a stab wound. In the photograph, Dr. Heidingsfelder documented the through-and-through stab wound of the kidney by the passage of a curved Metzenbaum instrument through the entrance and exit part of the stab wound.

¶ 17 Dr. Heidingsfelder further identified a cutting wound to Robert's right thumb and another cutting wound between the right thumb and index finger. Dr. Heidingsfelder identified an abrasion to the back of Robert's left hand and scrapes to the back of his knuckles. Dr. Heidingsfelder characterized the injuries on Robert's extremities as

defensive injuries, caused by interposing a hand to grab the knife or positioning the arm between the body and the knife.

¶ 18 Dr. Heidingsfelder identified additional blunt force injuries and sharp force injuries to Robert's face. Dr. Heidingsfelder testified that Robert suffered a bruise to his left eye, a broken nose, and a laceration to his upper lip on the right side. Dr. Heidingsfelder testified that Robert also had blunt force injury of abrasion and contusion to his chin at the midline and just to the left of the midline. Dr. Heidingsfelder testified that Robert also had sharp force injuries, at least four deep cutting wounds to the right side of his neck. Dr. Heidingsfelder testified that although the carotid arteries were not cut, there was a cutting wound of the jugular veins. Dr. Heidingsfelder testified that the veins on the right side of the neck were cut across completely. Dr. Heidingsfelder explained that a bleed from a vein occurs more slowly than one from an artery. Dr. Heidingsfelder identified a stab wound to the left side of Robert's neck, beneath the left earlobe, and testified that one of the stab wounds to the neck caused a hole in the lining of the back of the throat.

¶ 19 Dr. Heidingsfelder identified State's Exhibit No. 37, a photograph of Robert's face, showing bluing around his left eye, extending to the bridge of his nose. The photo revealed an abrasion on the bridge and on the tip of Robert's nose, in addition to abrasions of his upper lip and a stab wound to his left lower lip. Dr. Heidingsfelder also identified State's Exhibit No. 38, which was a photograph of Robert's face and upper chest region. Dr. Heidingsfelder noted that the photo depicted the stab wound to Robert's left lower lip and the wound's association with the base of Robert's tongue. Dr.

Heidingsfelder testified that the association was demonstrated by the presence of a blunt probe which extended through Robert's left lip to the stab wound into the tongue. Dr. Heidingsfelder opined that Robert's cause of death was exsanguination or blood loss due to multiple cutting wounds and stab wounds to his neck.

¶ 20 Officer Matt Lawson, a correctional officer for the Lawrence County Sheriff's Department, testified that the defendant was a pretrial detainee at the Lawrence County jail. Over defense objection, Officer Lawson testified that on May 17, 2012, the defendant initiated a conversation with him, requesting to be a trustee at the jail. Officer Lawson testified that he responded that the sheriff did not allow inmates to be trustees. When the defendant stated that he was a trustworthy inmate and an upstanding citizen who could be trusted, Officer Lawson stated that "murdering people is not very trustworthy." Officer Lawson testified that the defendant responded: "I do not murder people[.] I murder person."

¶ 21 Officer Lawson also testified that on May 31, 2012, he was supervising the defendant and his cellmates in the recreation yard, and he overheard a conversation between the defendant and another pretrial detainee, Michael Rodarmel. Officer Lawson testified that Rodarmel commented to the defendant that he would never leave the jail on $3 million bond, and the defendant stated: "I kill one person and I am labeled for life."

¶ 22 On cross-examination, defense counsel questioned Officer Lawson with regard to a prior statement where Officer Lawson said that the defendant "stated he doesn't kill people[.] [H]e kills person." Officer Lawson acknowledged that he used the term "kill," as opposed to "murder," in his prior written statement dated June 4, 2012. The court

denied the defense's request for a jury instruction (IPI Criminal 4th No. 3.11) allowing the jury to consider the prior inconsistent statement as substantive evidence, stating that Officer Lawson's use of "kill" and "murder" was a minor discrepancy that was not sufficient to justify giving the instruction.

¶ 23 In closing argument, defense counsel argued that the defendant was not guilty of first-degree murder, but was guilty of second-degree murder. The defendant's attorney argued that the recording of the defendant's interrogation revealed that the defendant was charged with a greater offense than what he committed. The defendant's attorney argued that the defendant suffered defensive wounds that showed he was being attacked with a knife and that the defendant's defensive wounds were consistent with his version of events in the recording. Defense counsel argued that Robert was armed when he had approached the defendant, that the defendant had tried to escape, and that in the process of defending himself, the defendant inflicted serious wounds on Robert.

¶ 24 Defense counsel further argued that Robert's mortal wounds were inflicted by someone else, and that same person moved Robert's body after his death. Defense counsel argued that when the defendant left the room where Robert was found, Robert was on the floor trying to get up. Defense counsel identified photos showing significant amounts of blood on the bedding, carpet, and floor, which were not beneath where Robert's body was found. Defense counsel noted that the photos revealed little blood on the bed directly beneath Robert's head and neck, from which, the pathologist had explained, Robert had bled to death. Accordingly, in closing argument, defense counsel argued that someone else had been in the house and moved Robert's body postmortem,

posing it to look out the window. Defense counsel noted, however, that the defendant had denied moving Robert's body. Defense counsel argued that it was nonsensical that the defendant would admit that he entered the home in the dead of night but that he would not admit to moving the body.

¶ 25 Defense counsel further argued that Robert's body position, where his face faced the window, indicated that someone "wanted the world to see it." Upon continuing this line of argument, to suggest that Helen Marie wanted the world to know that Robert was dead, defense counsel stated:

> "And that's the person who asked [the defendant] to kill Robert Westall, the person, according to the [unrebutted] testimony of Agent Brown ***, who sent the cops in the direction of interviewing [the defendant] [and] who had a personal grudge against [Robert]. For what? According to the State's evidence that you heard yesterday or the day before ***."

The State objected, arguing that "[t]his line of argument ha[d] no basis in fact and [wa]s totally irrelevant to this particular case." The circuit court sustained the State's objection. Defense counsel continued:

> "We would submit that Helen Marie Westall moved the body.
>
> * * *
>
> *** She had good reason to believe that it's possible [the defendant] is going to chicken out. She followed him to the scene. She stayed some distance back."

The State objected again on the same basis, the parties had a discussion off the record, and the circuit court sustained the State's objection.

¶ 26 Defense counsel noted that the defendant's hand was bleeding so that the handprint found on a nightstand at the crime scene must not have been the defendant's, considering there was no blood accompanying it. Defense counsel argued that the wound to Robert's right neck area was indicative of rage and anger that the defendant had not demonstrated on the video recording of his interrogation and would not have shown, considering that he did not know Robert. Defense counsel continued:

> "[The State] goes out of his way to tell you that this case is not about Helen Marie Westall. I'd like the opportunity to respond. This case is about Helen Marie Westall and [the defendant]. She started the ball rolling."

Again, the State objected, and the circuit court sustained the State's objection.

¶ 27 On May 3, 2013, the jury found the defendant guilty of first-degree murder, the circuit court found beyond a reasonable doubt that the murder was exceptionally brutal or heinous (730 ILCS 5/5-8-1(a)(1)(b) (West 2012)), and the circuit court sentenced the defendant to 50 years' imprisonment with 3 years' mandatory supervised release. In his motion for a new trial, the defendant argued, *inter alia*, that the State erred in admitting exhibits 6, 37, 38, and 58; that the court erred in allowing hearsay statements via Officer Lawson's testimony; and that the court erred in prohibiting defense counsel's closing argument regarding Helen Marie's culpability. Upon the circuit court's denial of the defendant's motion for new trial, the defendant filed a notice of appeal.

¶ 28 ANALYSIS

¶ 29 "Second-degree murder is a lesser mitigated offense of first-degree murder." *People v. Izquierdo-Flores*, 332 Ill. App. 3d 632, 637 (2002). Although the elements of

first-degree murder and second-degree murder are identical, second-degree murder differs from first-degree murder because of the presence of a statutory mitigating factor such as a serious provocation or an unreasonable belief in justification. *People v. Porter*, 168 Ill. 2d 201, 213 (1995). "Second-degree murder is a 'lesser offense' only in the sense that it is punished less severely than first-degree murder and it is mitigated because it is first-degree murder plus the presence of a mitigating factor." *Izquierdo-Flores*, 332 Ill. App. 3d at 637 (citing *People v. Jeffries*, 164 Ill. 2d 104, 122 (1995)). "[W]hen a defendant is on trial for first-degree murder, to be found guilty of second-degree murder, the defendant must prove by a preponderance of the evidence the presence of a statutory mitigating factor." *People v. Izquierdo-Flores*, 367 Ill. App. 3d 377, 384 (2006): 720 ILCS 5/9-2(c) (West 2012).

¶ 30 Closing Argument

¶ 31 The defendant argues that the circuit court improperly prohibited him from arguing in closing arguments the inferences that Helen Marie finished Robert's murder after the defendant left the premises and that Helen Marie posed Robert's body postmortem on the bed. The defendant argues that the circuit court abused its discretion and denied him his sixth amendment rights to counsel and to present a defense.

¶ 32 To support his argument that the circuit court's prohibition violated his right to counsel, the defendant cites *Herring v. New York*, 422 U.S. 853 (1975). In *Herring*, the Supreme Court considered the constitutionality of a New York statute that allowed the trial court in nonjury criminal trials the right to deny counsel the opportunity to make any closing argument before issuing a judgment. *Id.* at 856-58. The Court concluded that a

criminal defendant's right to make a closing summation before the finder of fact is a fundamental right derived from the sixth amendment guarantee of assistance of counsel. *Id.* Thus, the Court held that the law conferring power on the judge to prohibit absolutely the opportunity for any closing summation denied the defendant his sixth amendment right to the assistance of counsel. *Id.* Similar to *Herring*, Illinois courts have concluded that in a criminal case, the Illinois statutes and constitution contemplate that the trial court allow an opportunity for the defendant to argue his cause by counsel. *People v. Stevens*, 338 Ill. App. 3d 806, 810 (2003); *People v. Smith*, 205 Ill. App. 3d 153, 156-57 (1990); *People v. Diaz*, 1 Ill. App. 3d 988, 992 (1971).

¶ 33 In the present case, defense counsel argued in closing argument that the defendant was not guilty of first-degree murder but was guilty of second-degree murder, *i.e.*, that the defendant, at the time he performed the acts which caused Robert's death, believed the circumstances to be such that they justified the deadly force that he used, but his belief that such circumstances existed was unreasonable. He argued that after entering Robert's home, the defendant became scared, tried to escape, and had to defend himself against Robert's attack. He also argued that the defendant lacked the rage and anger to inflict Robert's deep wounds to the neck, so that someone else must have inflicted those mortal wounds. Accordingly, defense counsel was not denied the opportunity to make a proper closing argument to the jury. *Cf. Stevens*, 338 Ill. App. 3d at 810 (defendant denied right to make a proper closing argument in bench trial where trial court repeatedly interrupted defense counsel and showed prejudgment in remarks before counsel completed closing argument); *People v. Heiman*, 286 Ill. App. 3d 102, 113 (1996)

(defendant denied fair trial where trial court made premature and biased remarks during bench trial, repeatedly interrupted and argued with defense attorney during closing argument, and prevented attorney from presenting any argument fully before interruption); *Smith*, 205 Ill. App. 3d at 156 (defendant denied full benefit of constitutional right to effective assistance of counsel where trial court refused to listen to closing arguments after defense counsel's first sentence).

¶ 34 While a defendant's constitutional right to counsel includes the right to make a closing argument, the circuit court retains broad discretion in limiting the scope of closing argument. *Herring*, 422 U.S. at 862; *People v. Burnett*, 237 Ill. 2d 381, 389 (2010). In *Herring*, the Court explained its limited holding:

> "This is not to say that closing arguments in a criminal case must be uncontrolled or even unrestrained. The presiding judge must be and is given great latitude in controlling the duration and limiting the scope of closing summations. He may limit counsel to a reasonable time and may terminate argument when continuation would be repetitive or redundant. He may ensure that argument does not stray unduly from the mark, or otherwise impede the fair and orderly conduct of the trial. In all these respects he must have broad discretion." *Herring*, 422 U.S. at 862.

¶ 35 Accordingly, although defense counsel has wide latitude during closing argument and may comment on the evidence and draw any reasonable inferences that the evidence will support, a trial court has the discretion to prohibit defense counsel from making comments during closing argument that are speculative. See *People v. Harris*, 132 Ill. 2d

366, 391 (1989); *People v. Maldonado*, 402 Ill. App. 3d 411, 428-29 (2010). "When a trial court places limits on the scope of a defendant's closing, a reviewing court will reverse only if the trial court abused its discretion." *Maldonado*, 402 Ill. App. 3d at 429; see also *Harris*, 132 Ill. 2d at 391.

¶ 36 Here, even though defense counsel argued that someone else inflicted Robert's mortal neck wounds and moved his body postmortem, the circuit court denied defense counsel's attempt to identify Helen Marie as the offender. Other than the defendant's speculation during his interview that he believed Helen Marie may have followed him to Robert's, however, there was no evidence to support an argument that she did. The defendant on appeal cites as support Helen Marie's statement that she may have been recorded on the housing's surveillance camera on Thursday or Friday while scrunching down in a vehicle, but the defendant clearly stated in the recorded interview that he and Helen had traveled to Robert's together, prior to the trip that resulted in Robert's murder, and that they had hid as a neighbor drove by. No evidence indicated that Helen Marie had been inside Robert's home at the time of Robert's murder or stabbed Robert in the neck. Instead, the defendant had stated in his interview that Robert fell on his knife and wounded his neck, that he was bleeding from the neck after this initial wound, and that the defendant stabbed Robert repeatedly thereafter. A dusty handprint and blood evidence suggesting Robert's body movement did not require the circuit court to allow defense counsel to argue that Helen Marie surreptitiously followed the defendant to Robert's, remained hidden until the defendant left the premises, entered Robert's home, stabbed him to cause mortal wounds, and repositioned his body postmortem. A trial

court has the discretion to bar a defense counsel from making comments during closing argument that are speculative. See *id.* Although the circuit court lacked discretion to completely deny the defendant his right to make a proper argument at closing, the circuit court here allowed the defendant's closing summation, and its limitation on the defendant's speculative line of argument was not an abuse of discretion.

¶ 37 Officer Lawson's Testimony

¶ 38 The defendant argues that Officer Lawson's statements to the defendant, *i.e.*, that inmates are not trustworthy and murdering people is not very trustworthy, were irrelevant and more prejudicial than probative. The defendant argues that the jury was improperly exposed to Officer Lawson's belief that the defendant was untrustworthy like other inmates and that he was a murderer. Recognizing that defense counsel did not object to Officer Lawson's testimony regarding his statements to the defendant, the defendant argues that we should review the issue for plain error because the evidence was closely balanced or, alternatively, for ineffective assistance of counsel for counsel's failure to preserve the error. See *People v. Sorrels*, 389 Ill. App. 3d 547, 552 (2009) (a defendant forfeits an argument for appeal when he fails to object at trial or raise the issue in a posttrial motion).

¶ 39 "Both the United States and Illinois constitutions guarantee criminal defendants the right to the effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I, § 8." *People v. Hale*, 2013 IL 113140, ¶ 15. To succeed on a claim of ineffective assistance of counsel, a defendant must satisfy the two-pronged test set forth in *Strickland v. Washington*, 466 U.S. 668, 700 (1984), *i.e.*, a defendant must show that

counsel's performance fell below an objective standard of reasonableness and that counsel's deficient performance resulted in prejudice. *People v. Shaw*, 186 Ill. 2d 301, 332 (1998). "Further, in order for a defendant to establish that he suffered prejudice, he must show a reasonable probability that, but for counsel's deficient performance, the result of the proceedings would have been different." *People v. Burt*, 205 Ill. 2d 28, 39 (2001). "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* "Because a defendant must establish both a deficiency in counsel's performance and prejudice resulting from the alleged deficiency, failure to establish either proposition will be fatal to the claim." *People v. Sanchez*, 169 Ill. 2d 472, 487 (1996).

¶ 40 "The plain-error doctrine allows errors not previously challenged to be considered on appeal if either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Wilmington*, 2013 IL 112938, ¶ 31. "Under both prongs of the plain-error doctrine, the burden of persuasion remains with [the] defendant." *People v. Walker*, 232 Ill. 2d 113, 124 (2009).

¶ 41 When reviewing a claim under the first prong of the plain-error doctrine, "a reviewing court must undertake a commonsense analysis of all the evidence in context." *People v. Belknap*, 2014 IL 117094, ¶ 50. That analysis must be a "qualitative, as opposed to a strictly quantitative," one and must take into account "the totality of the circumstances." *Id.* ¶¶ 53, 62. Additionally, "[p]lain-error review under the closely-

balanced-evidence prong of plain error is similar to an analysis for ineffective assistance of counsel based on evidentiary error insofar as a defendant in either case must show he was prejudiced." *People v. White*, 2011 IL 109689, ¶ 133. "Accordingly, where a defendant fails to show prejudice, a defendant's allegations of ineffective assistance of counsel and plain error under the closely-balanced-evidence prong both fail." *People v. Hensley*, 2014 IL App (1st) 120802, ¶ 47.

¶ 42 In this case, we find that the defendant has forfeited this error in that even if Officer Lawson's statement that inmates and murderers are not trustworthy was improperly allowed, the defendant suffered no prejudice for purposes of plain error or ineffective assistance of counsel analysis. The evidence revealed that prior to Robert's murder, the defendant had agreed to kill Robert in exchange for $10,000 and a vehicle and that the defendant had acquired from Dane information about stabbing and killing a victim, stating he would choose to stab a victim so as to relieve frustration and anger. The evidence revealed that the defendant unlawfully entered Robert's front window at night, after disabling the telephone access, stabbed Robert repeatedly with a knife while he received minor cuts to his hands, and disposed of his bloody clothes in the river. The defense argued that the defendant was guilty of second-degree murder, in that although he had entered Robert's home to kill him, he had changed his mind, was attempting to escape when he was attacked by Robert, and believed, however unreasonably, that the circumstances justified his killing of Robert. However, a reasonable jury could have rejected the defendant's contention that he had changed his mind and instead concluded that the defendant, having acquired the information he needed to effectively kill his

victim and simultaneously relieve his frustration and anger, entered Robert's home with the purpose of killing him, in order to gain $10,000 and a vehicle, and stabbed Robert approximately 20 times, causing, among other injuries, deep mortal wounds to Robert's neck. The jury's verdict resulted from the overwhelming evidence properly adduced against the defendant at trial, and there was no reasonable probability of a different result had the evidence in question been excluded. See *White*, 2011 IL 109689, ¶ 133. We find no plain error or ineffective assistance of counsel.

¶ 43 The defendant further argues that the circuit court abused its discretion in allowing into evidence Officer Lawson's testimony regarding the defendant's response, *i.e.*, that the defendant did not kill/murder people, he killed/murdered person, because Officer Lawson violated the defendant's sixth amendment right to counsel by making a statement to the defendant reasonably likely to elicit an incriminating response, after the defendant's counsel right had attached. The defendant argues that the circuit court compounded the error by wrongfully prohibiting him from presenting Officer Lawson's prior inconsistent statement as substantive evidence in closing and to have the jury instructed regarding the prior inconsistent statement. The State counters that the defendant's claim that his admission to Officer Lawson violated his sixth amendment right to counsel is procedurally forfeited for failure to include it in a posttrial motion.

¶ 44 "Ordinarily, to preserve an issue for review a party must raise it at trial and in a written posttrial motion." *People v. Almond*, 2015 IL 113817, ¶ 54. Although the defendant failed to raise this sixth amendment issue in his posttrial motion, he raised the issue at trial. Defense counsel argued at trial that the defendant's statement was elicited

by Officer Lawson as a result of an interrogation situation. Defense counsel argued that the statements were "an exchange of information between an officer, an agent of the State, an agent of the Sheriff's office, to a defendant" which should be barred. "[C]onstitutional issues that were previously raised at trial and could be raised later in a postconviction petition are *not* subject to forfeiture on direct appeal." (Emphasis in original.) *Id.* " '[T]he interests in judicial economy favor addressing the issue on direct appeal rather than requiring defendant to raise it in a separate postconviction petition.' " *Id.* (quoting *People v. Cregan*, 2014 IL 113600, ¶ 18). Accordingly, we will review the merits of the defendant's sixth amendment challenge.

¶ 45 The sixth amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right *** to have the Assistance of Counsel for his defense." U.S. Const., amend. VI. "This protection attaches as a matter of right at the initiation of adversary judicial proceedings and a defendant is entitled to counsel at all critical stages of the proceedings." *People v. Curtis*, 219 Ill. App. 3d 218, 221 (1991). Accordingly, once adversary proceedings have commenced against an individual, the sixth amendment requires that he be afforded the right to legal representation when the government interrogates him because interrogation represents a critical stage at which the sixth amendment applies. *Brewer v. Williams*, 430 U.S. 387, 401 (1977); *Massiah v. United States*, 377 U.S. 201, 206 (1964). Interrogation includes words or conduct specifically intended to elicit incriminating statements. *People v. Jumper*, 113 Ill. App. 3d 346, 351 (1983) (citing *Brewer*, 430 U.S. at 430). Statements obtained in violation of a

defendant's sixth amendment rights are not admissible at trial. *Massiah*, 377 U.S. at 207; *Curtis*, 219 Ill. App. 3d at 221.

¶ 46 The defendant contends that the introduction of Officer Lawson's testimony violated his constitutional right to the presence of counsel during a postindictment interrogation under the doctrine of *Massiah*, 377 U.S. at 206. In *Massiah*, the Supreme Court considered an incriminating postindictment conversation between Massiah and a codefendant who had agreed to cooperate with customs officials by permitting the installation in his car of a radio transmitter enabling government agents to overhear his conversation with Massiah without Massiah's knowledge. *Id.* The Court held that the defendant was denied the basic protections of the sixth amendment guarantee "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." *Id.*; see also *People v. Milani*, 39 Ill. 2d 22, 26 (1968).

¶ 47 "The court in *Maine v. Moulton* (1985), 474 U.S. 159, 176 ***, clarified *Massiah* by holding that any attempt by the State to deliberately elicit incriminating information from an accused or to knowingly exploit an opportunity to confront the accused without counsel being present violates the sixth amendment." *People v. Hoskins*, 168 Ill. App. 3d 904, 910 (1988). In *Maine*, the Court stated:

> "The Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State. *** [T]his guarantee includes the State's affirmative obligation not to act in a manner that circumvents the protections accorded the accused by invoking this

right. The determination whether particular action by state agents violates the accused's right to the assistance of counsel must be made in light of this obligation. Thus, the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached. [Citation.] However, knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity. Accordingly, the Sixth Amendment is violated when the State obtains incriminating statements by knowingly circumventing the accused's right to have counsel present in a confrontation between the accused and a state agent." *Maine*, 474 U.S. at 176.

¶ 48 In this case, there is no evidence that Officer Lawson's statements were part of a deliberate and designed attempt to elicit incriminatory information from the defendant so as to constitute an interrogation. See *People v. Kavinsky*, 91 Ill. App. 3d 784, 792 (1980). Moreover, even if the admission of the defendant's statement were in error, any error in its admission was harmless beyond a reasonable doubt. See *Milton v. Wainwright*, 407 U.S. 371, 372 (1972) (possible error in introduction of postindictment, pretrial confession made to police officer posing as fellow prisoner, arguably in violation of sixth amendment, was harmless beyond a reasonable doubt in light of other unchallenged confessions and corroborative evidence of guilt). The defendant's statement that he killed, or murdered, a person, was not in contention: the defendant's trial centered not on

whether he killed or murdered Robert but on whether he was guilty of first-degree murder or second-degree murder. Further, the evidence was duplicative of the defendant's statement to his cellmate on May 31, 2012, "I kill one person and I am labeled for life." The evidence was also cumulative to the defendant's statements during his interview to police. This testimony did not contribute to the jury's finding of the defendant's guilt, and the properly admitted evidence in this case overwhelmingly supported the defendant's guilt. Therefore, any error in the admission of the defendant's statement was harmless beyond a reasonable doubt. See *People v. Curtis*, 113 Ill. 2d 136, 151 (1986) (admission of lineup identification after lineup was held in absence of lawyer in violation of the defendant's sixth amendment right to counsel was harmless beyond reasonable doubt); *People v. Kruger*, 363 Ill. App. 3d 1113, 1123 (2006) (even though grand-jury testimony should not have been admitted, as it violated the defendant's sixth amendment right to counsel, any error was harmless beyond a reasonable doubt in light of the overwhelming evidence of the defendant's guilt).

¶ 49 Likewise, we reject the defendant's argument that the circuit court abused its discretion in prohibiting defense counsel from using Officer Lawson's allegedly prior inconsistent statement as substantive evidence and in denying counsel's request to instruct the jury that the statement may be considered substantively.

¶ 50 "Under section 115-10.1 [of the Code of Criminal Procedure of 1963], a prior inconsistent statement may be offered not just for purposes of impeachment, but as substantive evidence, so long as the witness is subject to cross-examination and the statement:

'(1) was made under oath at a trial, hearing, or other proceeding, or

(2) narrates, describes, or explains an event or condition of which the witness had personal knowledge, and

(A) the statement is proved to have been written or signed by the witness, or

(B) the witness acknowledged under oath the making of the statement either in his testimony at the hearing or trial in which the admission into evidence of the prior statement is being sought, or at a trial, hearing, or other proceeding, or

(C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording.' 725 ILCS 5/115-10.1(c) (West 2008)." *People v. Wilson*, 2012 IL App (1st) 101038, ¶ 38.

See also IPI Criminal 4th No. 3.11 (believability of witness may be challenged by prior inconsistent statement, which may be used as impeachment, and, if criteria are met, evidence).

¶ 51 To be admissible, the prior statement must be inconsistent with the testimony at the hearing or trial. 725 ILCS 5/115-10.1 (West 2012). "[A] prior statement is inconsistent with a witness's trial testimony when it has a tendency to contradict the trial testimony." *People v. Zurita*, 295 Ill. App. 3d 1072, 1077 (1998). "Inconsistencies may be found in evasive answers, silence, or changes in position." *Id.* "The determination of whether a witness's prior testimony is inconsistent with his present testimony is left to the

sound discretion of the trial court." *Id.* Likewise, "[a] trial court's determination as to the instructions to be given to a jury will not be disturbed absent an abuse of discretion." *In re Timothy H.*, 301 Ill. App. 3d 1008, 1015 (1998).

¶ 52 In the case *sub judice*, after testifying that the defendant had stated, "I do not murder people[.] I murder person," Officer Lawson admitted on cross-examination that he had previously written a report that reflected that the defendant had used the word "kill" instead of "murder." However, we find that Officer Lawson's prior statement was not inconsistent with his testimony at trial. See *People v. Petty*, 160 Ill. App. 3d 207, 212 (1987). Officer's Lawson's use of the term "murder" did not contradict his earlier use of the term "kill." Indeed, the terms are not inherently inconsistent, especially in light of the circumstances of the defendant's case. The defendant's argument regarding Officer Lawson's inconsistent statement is premised on the suggestion that the term "murder" is more offensive than the term "kill"; however, the defendant's defense at trial was that he committed second-degree murder, not first-degree murder. Thus, Officer Lawson's use of the term "murder" was arguably consistent with the defendant's defense. Accordingly, we find untenable the suggestion that Officer Lawson's substitution of the word "kill" with the word "murder" was inconsistent and prejudicial under the circumstances of this case. See *Jager v. Libretti*, 273 Ill. App. 3d 960, 967 (1995) ("Because we fail to see anything inherently inconsistent about Jager complaining of pain immediately after the accident and then failing to make the same complaint at a later time and place, we conclude the trial court did not abuse its discretion when it refused to instruct the jury on impeachment by inconsistent statement or conduct."). The circuit

court did not abuse its discretion in refusing to allow Officer Lawson's statement to be considered substantively and in declining to instruct the jury accordingly.

¶ 53 Photographs

¶ 54 The defendant argues that the circuit court abused its discretion and deprived him of a fair trial by allowing into evidence graphic photographs of Robert's dead body, wounds, and removed organs. We disagree.

¶ 55 "It is well settled in Illinois that the admission into evidence of photographs of a crime victim is within the sound discretion of the trial court and, when the photographs are relevant to establish some material fact, they are admissible despite their gruesome nature." *People v. Hefley*, 109 Ill. App. 3d 74, 76 (1982). "Photographs of a decedent may be admitted to prove the nature and extent of injuries and the force needed to inflict them, the position, condition and location of the body, the manner and cause of death, to corroborate a defendant's confession, and to aid in understanding the testimony of a pathologist or other witness." *People v. Richardson*, 401 Ill. App. 3d 45, 52 (2010); see also *People v. Brown*, 172 Ill. 2d 1, 41 (1996). When ruling on the admissibility of such photographs, the trial court must weigh each exhibit's prejudicial effect against its probative value, keeping in mind that "[c]ompetent evidence should not be excluded merely because it may arouse feelings of horror or indignation." *People v. Degorski*, 2013 IL App (1st) 100580, ¶ 100. "If evidence has sufficient probative value, it may be admitted despite its gruesome or inflammatory nature." *Id.* "When a photograph serves no purpose other than to inflame and prejudice the jury, however, it must be excluded." *People v. Christen*, 82 Ill. App. 3d 192, 197 (1980). The decision to admit photographs

into evidence is left to the trial court's discretion, and the trial court's decision will not be overturned absent an abuse of discretion. *Brown*, 172 Ill. 2d at 40-41.

¶ 56 At trial, the State introduced exhibits 6, 37, 38, and 58, over objection. Debra identified exhibit 6, which depicted the right side of Robert's bloodied face, his mouth agape, and the deep, bloody neck wounds, as a representation of Robert's position, condition, and location when she first found him dead. Dr. Heidingsfelder identified exhibit 37, depicting Robert's blackened left eye, sewn shut; exhibit 38, depicting with four photos a hole in Robert's lower lip; and exhibit 58, depicting four angles of Robert's kidney and the stab wound to it, as he testified to the nature and extent of Robert's injuries, and the force needed to inflict them. Accordingly, the photos established the nature and extent of Robert's injuries, discredited the defendant's assertion that he was merely defending himself from Robert's attack, and aided the jury in understanding the testimony regarding Robert's cause of death. The photographs assisted the jurors in understanding the testimony at trial, and the probative value of the photos was sufficient to outweigh any prejudicial effect they may have produced. See *People v. Harris*, 182 Ill. 2d 114, 151 (1998). "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). Here, we cannot conclude that the trial court abused its discretion in admitting exhibits 6, 37, 38, and 58 into evidence.

¶ 57 Cumulative Error

¶ 58 The defendant argues that even if the asserted errors were not individually reversible, together they create a pervasive pattern of unfair prejudice requiring a new trial on the basis of cumulative error. See *People v. Howell*, 358 Ill. App. 3d 512, 526 (2005). We disagree. Because we are not persuaded by any of the defendant's claims, we certainly cannot conclude that they cumulatively led to prejudice. See *People v. Perry*, 224 Ill. 2d 312, 356 (2007) (in rejecting each of the defendant's claims, cumulative error analysis was not necessary); *People v. Burgess*, 2015 IL App (1st) 130657, ¶¶ 164-65 (because court was not persuaded by any of defendant's claims, court declined to consider if the alleged errors cumulatively led to prejudice).

¶ 59 "Moreover, it is axiomatic that a criminal defendant is entitled to a fair trial, not a perfect one [citation], *i.e.*, one totally free of error." *People v. McDonald*, 189 Ill. App. 3d 374, 380 (1989). "It is implicit in this rule that the fairness of a trial is determined from the record as a whole, not isolated instances of alleged error." *Id.* We have reviewed the record as a whole and find that the defendant was not denied a fair trial.

¶ 60 CONCLUSION

¶ 61 For the foregoing reasons, we affirm the defendant's conviction for first-degree murder.

¶ 62 Affirmed.