2018 IL App (1st) 151308-U

No. 1-15-1308

Order filed December 6, 2018

Fourth Division

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 15961
	)	
HAKEEM REDMOND,	)	Honorable
	)	William G. Lacy,
Defendant-Appellant.	)	Judge presiding.

JUSTICE BURKE delivered the judgment of the court.
Presiding Justice McBride and Justice Gordon concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was not denied a fair trial by the State's use of gang evidence and its remarks during its opening statement and closing argument where both the evidence and the State's remarks were proper. Defendant's trial counsel did not provide ineffective assistance, and defendant forfeited his claim that the trial court erred in denying his posttrial motion for new trial.

¶ 2 Following a jury trial, defendant Hakeem Redmond was convicted of first-degree murder and sentenced to 50 years' imprisonment. On appeal, he contends that: (1) his right to a fair trial

was violated when the State presented incompetent gang evidence which was further compounded by the State's remarks during its opening statement and closing argument that the murder was the result of gang warfare; (2) his trial counsel provided ineffective assistance by failing to object to portions of a witness' testimony, which identified him as a gang member and described the escalation of a gang feud, and by failing to move for a mistrial based on the admission of the gang evidence coupled with the State's remarks during its opening statement and closing argument; and (3) the trial court erred in denying his motion for new trial based on newly discovered evidence. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On July 21, 2009, Tyrone Bennett was found dead in a vacant lot with a gunshot wound to his head. More than a week later, defendant, who was in custody on an unrelated matter, was charged with multiple counts of first-degree murder for killing Bennett.

¶ 5 As the case proceeded toward trial, the State filed a motion *in limine* seeking to introduce evidence that: defendant was an active member of the Unknown Vice Lords gang; defendant's shooting targeted members of the Traveling Vice Lords gang; and the shooting was the result of an ongoing feud between the two gangs that involved a series of escalating events. The State posited that the gang evidence was relevant to explain the actions of defendant and to establish his identity as the shooter. During argument on the motion, the State remarked that the evidence would be testified to by one witness, Saquan Toney, and "possibly" another, Darryl Porter.

¶ 6 Defendant objected to the admission of the evidence, arguing that the State had not alleged that he took part in the purportedly escalating feud between the two gangs, and thus, it had not connected the gang evidence to a specific motive of his to commit the shooting. Furthermore, defendant asserted that the State was prejudicing him by associating him with the

gang activity. The trial court observed that, due to the nature of gang conflicts and the loyalty of gang members to their own gangs, it was irrelevant that the State had not alleged defendant was specifically involved in the escalating conflict. The court then found the gang evidence relevant to prove defendant's intent, motive and identification, as a whole, more probative than prejudicial. It accordingly granted the State's motion *in limine*.

¶ 7 A. Trial

¶ 8 1. Opening Statements

¶ 9 In the State's opening statement, it recounted that, when the police arrived at the scene of the crime, they observed the dead body of Tyrone Bennett, who had been killed as a result of a single gunshot wound to the head. The State remarked that Bennett "became the latest statistic in Chicago's culture of senseless gang violence," which prompted an unsuccessful objection from defense counsel. The State continued, informing the jurors that it would take them back to a neighborhood on Chicago's west side, "[a] neighborhood with a problem" of "senseless gang violence." The State subsequently outlined the evidence it would present, including that two factions of the Vice Lords gang were in a feud and defendant was a member of one faction.

¶ 10 In defendant's opening statement, defense counsel acknowledged that gang violence was ubiquitous in parts of Chicago, but that was "not why we are here." Counsel stated it was fine to be mad about gang violence, but those conflicts had "absolutely no place in judging the facts" of defendant's case. Counsel asked the jury to listen to the evidence and judge the credibility of the State's witnesses, which he posited would not show defendant was guilty.

¶ 11 2. The Evidence

¶ 12 In the State's case, Saquan Toney, a two-time convicted felon and admitted member of the Traveling Vice Lords, and Darryl Porter, a three-time convicted felon and admitted former

member of the Traveling Vice Lords, testified. Toney and Porter both knew defendant from high school, but only Toney identified him as a member of the Unknown Vice Lords. Porter did not know if defendant belonged to a gang.

¶ 13 According to Toney, the Traveling Vice Lords and the Unknown Vice Lords had a presence in the area around the Eisenhower Expressway and the Central Park Avenue bridge that spanned over the expressway. On the north side of the expressway was the territory of a faction of Unknown Vice Lords, and on the south side of the expressway was the territory of the Traveling Vice Lords and another faction of Unknown Vice Lords. In July 2009, there was "tension" between the faction of Unknown Vice Lords north of the expressway and the Traveling Vice Lords, stemming from members of both gangs "flash[ing]" money they obtained from selling drugs at each other. One night, the Unknown Vice Lords came into the territory of the Traveling Vice Lords and sprayed champagne on members of the Traveling Vice Lords. A "big fight" erupted later in the night, which prompted the Unknown Vice Lords to come back into the territory of the Traveling Vice Lords and shoot at them. The Traveling Vice Lords and apparently members of the faction of Unknown Vice Lords south of the expressway retaliated by shooting at members of the faction of Unknown Vice Lords north of the expressway. At trial, on cross-examination, Toney admitted that he was only present for the fight.

¶ 14 On July 21, 2009, Toney was selling heroin on West Lexington Street just to the east of South Central Park Avenue with Porter and "Joe Blow," a member of the Unknown Vice Lords. Porter and Joe Blow were acting as lookouts. Toney's drugs were located behind a house in an alley between West Flournoy Street and West Lexington Street. While Toney was selling heroin, he was also keeping an eye out for a red van. By 5 p.m. that day, Tyrone Bennett had joined

Porter on the corner of South Central Park Avenue and West Lexington Street, though no one considered Bennett to be an active member of the Traveling Vice Lords.

¶ 15 At some point within the next hour, Toney observed a red van driving north on South St. Louis Avenue, a street just to the east of where Tony was selling heroin. But he ignored the van because around the same time, two people came up to him looking to buy heroin. Toney walked into the alley to retrieve the heroin where he again observed the red van, this time driving slowly. Toney was about 15 feet away from the van and recognized the front passenger as defendant. Seconds later, Toney ran. As he was running, he called Porter on a walkie-talkie and told him to run, too. But Porter could not understand Toney, so Porter and Bennett remained on the corner. As Toney attempted to again tell Porter to run, Porter heard gunshots and began to run with Bennett by his side. Toney continued to run and heard 8 to 10 gunshots, though he never saw the shooter. While Porter and Bennett were running, they both fell down in a vacant lot. Porter got up and continued running, but lost track of Bennett.

¶ 16 Multiple other witnesses observed the shooting. James Williams was in the alley between West Flournoy Street and West Lexington Street throwing away grass clippings in a garbage can when he observed a red van and defendant exit the van. Defendant began talking to someone standing in the alley. That person walked away from defendant and shortly thereafter, defendant began shooting in the direction of the person who walked away. But because of garages blocking his view and taking cover in the alley, Williams could not see exactly at whom defendant was shooting. Defendant walked back toward the van, looked directly at Williams from about three or four feet away, and entered the van, which then drove away through the alley.

¶ 17 Vanessa Beene and Basia Brayboy were at Brayboy's house located on South Central Park Avenue between West Flournoy Street and West Lexington Street. Behind Brayboy's house

was a garage that abutted the alley. Beene and Brayboy decided to get ice cream, and as the two were walking down the stairs from the second floor to the first floor in an enclosure in the back of the house, Brayboy observed a red van speeding through the alley behind her house. The van stopped, three people wearing hoodies exited and ran down the alley. Suddenly, both Brayboy and Beene heard several gunshots. Beene looked out a window and observed a Black male holding a firearm. Though she was not able to see the face of the man with the firearm, she observed the man enter the passenger's side of a red van, which then sped away. Both Brayboy and Beene later discussed what they had seen with the police.

¶ 18 Larry Spears, who lived on West Flournoy Street between Central Park Avenue and South St. Louis Avenue, was grilling in his backyard when he heard gunshots. He immediately ran into his house and looked out of a window that faced the alley between West Flournoy Street and West Lexington Street. In the alley, approximately 50 feet away, Spears observed a parked red van with the passenger door open. A man jumped into the passenger side and shut the door, and the van proceeded to drive toward Spears' house at which point he observed the front passenger was defendant. Spears subsequently called the police and reported what he had seen.

¶ 19 The police arrived on the scene shortly thereafter. Bennett was found dead in a vacant lot at the corner of West Lexington Street and South Central Park Avenue. He died as a result of a single gunshot wound to the head, and the bullet was recovered. Based on information Detective Ericilio Ruiz learned at the scene, he sought out and spoke to Porter, who agreed to come back to the police station. There, Porter told Detective Ruiz that he observed defendant fire a handgun three or four times in his and Bennett's direction. Based on this identification, defendant became a suspect in the shooting, and Detective Ruiz created a photo array, which included defendant's

photograph. Porter viewed the photo array and circled defendant's photograph, identifying him as the shooter.

¶ 20 Around this time, the police located a red van in a vacant lot that matched the description of the vehicle involved in the shooting. The van had been reported stolen earlier in the day. Officer Maurice Henderson processed the van for evidence and recovered a fired bullet as well as five fingerprints on the exterior of the vehicle, but none in the interior. He also took various swabs in the van for DNA analysis. Over the course of the next week, the police as well as assistant State's Attorneys interviewed the various witnesses.

¶ 21 On July 22, the day after the shooting, Spears viewed a photo array and identified defendant as the person he observed enter the red van. Four days later, Toney viewed a photo array and identified defendant as the person he saw in the front passenger seat of the red van. On July 29, a little more than one week after the shooting, Brayboy and Williams separately viewed a photo array and both identified defendant as the shooter. The following day, Detective Michael Corlett learned that defendant was in custody on an unrelated matter, prompting the police to bring back the various witnesses that night to view a lineup. Spears, Williams, Toney and Braboy went to the police station, separately viewed a lineup, and they all identified defendant: Spears and Toney as the person they observed in the van, and Williams and Brayboy as the shooter. Beene viewed the lineup, but could not identify anyone.

¶ 22 On July 31, Brayboy met with assistant State's Attorney Theresa Smith-Conyers and gave a written statement about the shooting. In the statement, Braboy asserted that defendant was one of the individuals who exited the red van and he had shot a firearm in the alley. Brayboy told Smith-Conyers that she was afraid to get involved and reluctant to speak to the police. That same day, Porter met with assistant State's Attorney Phyllis Warren, but he declined to give a written

statement. According to Warren, Porter did tell her that defendant fired a handgun three or four times in his and Bennett's direction and that he had seen a red van both before and after the shooting.

¶ 23 The following week, Brayboy met with assistant State's Attorney Jodi Peterson in anticipation of providing grand jury testimony. Brayboy told Peterson that her July 31 written statement contained several inaccuracies and she would not testify to untrue statements. Brayboy stated that she did not actually observe the shooter's face and only indentified defendant as the shooter because she had been threatened by Detective Greg Swiderek. Peterson convened a meeting with Brayboy, Brayboy's mother, two other assistant State's Attorneys and Swiderek. At the meeting, assistant State's Attorney Peterson asked Brayboy to explain how Detective Swiderek had threatened her. Brayboy could not give specifics, which prompted Peterson to continue to ask for details. Brayboy became agitated and did not provide any specific examples. She did remark that she felt like she could not leave the police station until she identified defendant as the shooter. Brayboy ultimately did not testify before a grand jury.

¶ 24 On August 12, Porter appeared before a grand jury and testified that he observed a red van and shortly thereafter, observed defendant emerge from an alley holding a firearm. Porter then heard three gunshots. Although Porter did not actually see defendant shoot the firearm because he was trying to run away, he was certain defendant had done so.

¶ 25 Later during the investigation, forensic scientist Michael Cox compared the fingerprints recovered in the red van to a known sample of defendant, but none matched. Forensic scientists Michele Bybee and Lisa Kell analyzed the DNA swabs taken from the red van, which resulted in mixed profiles being found. Defendant's DNA was compared to the mixed profiles, but he was excluded as contributing to them. Firearms analyst Angela Horn examined the two bullets

recovered during the investigation, one from Bennett's head and one from the van, and determined that they had been discharged from different firearms. However, she could not identify which firearms because none had been recovered in connection with the case.

¶ 26 At trial, Porter told a narrative of events that conflicted with the testimony of the State's other witnesses and his statements shortly after the shooting. Most notably, he testified that he never saw defendant shoot a firearm or even observed him at the time of the shooting. On the night of the shooting, Porter recalled being brought to the police station involuntarily in handcuffs. He acknowledged that he told the police that he had seen a red van driving near the time of the shooting and acknowledged circling defendant's photograph in a photo array. However, Porter explained that he only circled defendant's photograph because he knew defendant, not because defendant was the shooter. Porter also testified that he told assistant State's Attorney Warren that defendant was not the shooter and that the police had threatened to pin drug charges on him if he did not cooperate. Porter added that he told Warren he only circled defendant's photograph in the photo array because he knew him. Porter further denied at trial that he implicated defendant as the shooter in his grand jury testimony.

¶ 27 At trial, Sergeant Ruiz, having been promoted from detective, denied that he had handcuffed Porter, taken him to the police station involuntarily or threatened him. Warren denied being told by Porter that he only circled defendant's photograph in the photo array because he knew him, and she asserted that Porter told her that defendant was the shooter. Warren also testified that Porter told her the police had treated him well and he not received any threats to cooperate. Additionally, assistant State's Attorney Peterson, who presented Porter to the grand jury, testified that he never told her in their interview beforehand that he had been threatened.

¶ 28 Brayboy also told a narrative of events at trial that conflicted with the testimony of the State's other witnesses and her statements shortly after the shooting. Brayboy testified that her July 31 statement was littered with inaccuracies, and although she acknowledged hearing the gunshots, she denied ever seeing the face of the person who fired them. Though she admitted to selecting defendant in both a photo array and lineup, she explained that she only selected him in the photo array because Detective Corlett told her to pick the person whose skin complexion most resembled that of the person she observed in the alley and only selected defendant again in the lineup because that was whom she selected in the photo array. Brayboy further testified that she informed the assistant State's Attorneys that Detective Swiderek had threatened her into identifying defendant as the shooter.

¶ 29 At trial, Detective Swiderek denied ever threatening Brayboy into identifying defendant. Assistant State's Attorney Smith-Conyers also testified that, at no point during her interview with Brayboy on July 31, did she complain about her treatment from the police. Smith-Conyers added that Brayboy never told her she selected defendant in the photo array or lineup simply due to his skin complexion most resembling that of the person she observed in the alley.

¶ 30 Defendant did not testify or present any other evidence on his behalf.

¶ 31 3. Closing Arguments and Jury Verdict

¶ 32 In the State's closing argument, it began by focusing the jury on "the world of gang warfare on the west side of the City of Chicago." The State reminded the jury about the events leading up to Bennett's death, beginning with rival gang members "flashing" money followed by the champagne-spraying incident, which ultimately escalated into violence with firearms. The State then remarked that "the face of gang warfare sits right across the courtroom from you" in

defendant because he was the one who armed himself with a firearm, drove into the territory of a rival gang and began shooting, which resulted in Bennett's death.

¶ 33 The State subsequently reviewed the evidence it presented, including the various identifications made by eyewitnesses. Later, the State returned to Bennett, who it called a "victim of gang warfare" and "collateral damage in a war" wherein "[i]nnocent victims" were killed. And in talking about the west side of Chicago, the State reiterated that it was "a gang and drug infested area." After arguing to the jury that the identifications of defendant were reliable, the State stated: "People cannot be gunned down in the street because they live and have the misfortune of living in drug infested and gang infested areas. We cannot allow for collateral damage to occur on our streets." The State immediately told the jury that it had the opportunity to tell defendant that Bennett "was not collateral damage and his life mattered." The State concluded that it could turn that opportunity into action by finding defendant guilty of first-degree murder.

¶ 34 In defendant's closing argument, defense counsel argued that the identifications of defendant were unreliable given the short period of time in which the witnesses had to observe the shooter, their distance from the shooter and the stressful circumstances in which they observed the shooting. Counsel further highlighted that both Porter and Brayboy had recanted their previous identifications of defendant as the shooter and noted their allegations of police coercion and mistreatment mirrored each other. Additionally, counsel asserted that no physical evidence connected defendant to the shooting or the red van. And concerning the gang tensions in the area where the shooting occurred, counsel posited that there was no evidence defendant had been involved in that escalation.

¶ 35 In rebuttal, the State acknowledged the recanted identifications from Porter and Brayboy, but highlighted their initial statements wherein they identified defendant. The State reiterated to the jury that Bennett "became a statistic in the senseless gang violence on the streets of Chicago." Near the conclusion of its argument, the State further remarked that, if the jury found defendant guilty, it would "tell the defendant no. No more shooting. No more murder. Not on the streets of our city. No on the streets of our county. Not on the streets of our state."

¶ 36 Following closing arguments, the jury found defendant guilty of first-degree murder and that he was armed with a firearm during the commission of the offense.

¶ 37 B. Posttrial

¶ 38 Defendant, through his trial counsel, filed a motion for new trial. Thereafter, the trial court granted his counsel leave to withdraw, and he was replaced with another attorney. Over the course of the next several months, defendant's new attorney filed multiple supplemental motions for new trial. Through the various motions, defendant argued that the State committed misconduct during its opening statement and closing argument with its repeated references to gang warfare, which unfairly inflamed the passions of the jury. Defendant also argued that his trial counsel had been ineffective for failing to interview Dwayne Combs, whom defendant allegedly told counsel about "prior to trial," and had counsel interviewed Dwayne, information from that interview would have led counsel to two additional witnesses, Darius Combs and Larry Matthews. Defendant posited that all three men would have testified that he was not the shooter. Additionally, defendant argued that his trial counsel was ineffective for failing to argue that he had no motive for the shooting where he had not been implicated in any of the rising tensions between the rival gangs.

¶ 39 At a hearing on defendant's motions for new trial, Dwayne, Darius and Matthews all testified. All three of the men testified that they knew defendant from high school and asserted that they were present at the time of the shooting. They observed the shooter, but were adamant that defendant was not the shooter or present at the time of the shooting. Despite this knowledge, they all acknowledged not telling defendant's trial counsel and not telling the police because they feared they would be harassed by them. Dwayne did not come forward until after defendant's trial, but decided to because he knew defendant was innocent. Darius stated that he told his mother what he knew about defendant not being the shooter, but never told the authorities until after defendant's trial. Matthews also admitted coming forward only after defendant's trial and acknowledged being in Cook County Jail at the same time as defendant. But Matthews asserted that he did not tell defendant what he knew, and they never talked about the shooting.

¶ 40 Defendant also testified at the hearing, stating that he only learned after his trial that Dwayne, Darius and Matthews were present at the time of the shooting, though he knew Dwayne was often outside in the area where the shooting occurred. Because before his trial, "a lot of people out there [were] saying that [he] didn't do" the shooting, defendant told his trial counsel that he should send an investigator to speak with Dwayne because he was always hanging around the area where the shooting occurred and might know something. Defendant testified that he specifically gave his trial counsel Dwayne's name, though he did not have any of Dwayne's contact information. According to defendant, counsel said he would send an investigator to the area to find Dwayne.

¶ 41 Lastly, Mark Kusatzky, defendant's trial counsel, testified and denied that, either before or after trial, defendant ever asked him to locate Dwayne, Darius or Matthews. Kusatzky added that he had never heard Dwayne's name before.

¶ 42 After argument, the trial court denied defendant's motions for new trial, noting that Dwayne, Darius and Matthews only came forward after trial, but more generally that it thought they were "wholly incredible." Concerning defendant, the court stated that it did not "believe a single word he said about" his trial counsel's actions, specifically about being forced into a jury trial and not testifying, which were other claims defendant had made in his motions for new trial. On the whole, the court noted that trial counsel's performance was "excellent" and "far from ineffective," and counsel "clearly overwhelmingly went beyond the standards set forth in the *Strickland* matter."

¶ 43 The case proceeded to sentencing, where the trial court sentenced defendant to a total of 50 years' imprisonment, 35 years for the first-degree murder of Bennett and an additional 15 years as a firearm enhancement. Defendant timely appealed.

¶ 44 II. ANALYSIS

¶ 45 A. Gang Evidence and Fair Trial

¶ 46 Defendant first contends that his right to a fair trial was violated when the State presented inadmissible and irrelevant gang evidence which was further amplified by the State's comments during its opening statement and closing argument that the murder was the result of gang warfare.

¶ 47 Under both the United States and Illinois Constitutions, a defendant is entitled to a fair and impartial trial conducted in accordance with the law. *People v. Bull*, 185 Ill. 2d 179, 214 (1998) (citing U.S. Const., amend. XIV; Ill. Const. 1970, art. I, § 2). The "defendant's guilt may be proved only by 'legal and competent' facts, 'uninfluenced by bias or prejudice raised by irrelevant evidence.' " *People v. Blue*, 189 Ill. 2d 99, 129 (2000) (quoting *People v. Bernette*, 30 Ill. 2d 359, 371 (1964)).

¶ 48 1. Admission of the Gang Evidence

¶ 49 We begin with defendant's contention concerning the admissibility of the gang evidence. At oral argument, defendant conceded that, based on what the State presented to the trial court before trial, the court did not err in granting the State's motion *in limine*, which allowed the State to present the gang evidence. But defendant argues that the State committed misconduct during trial when it turned out that the gang evidence was incompetent and prejudicial. In essence, defendant asserts that the State failed to provide a sufficient foundation for the gang evidence, thus rendering the evidence inadmissible.

¶ 50 Before delving into the merits of this issue, we first must address whether defendant preserved the issue for review. He argues that he did by objecting to the State's pretrial motion *in limine* and including the issue in his posttrial motions for new trial. While defendant objected to the State's pretrial request to admit the gang evidence, a review of his motions for new trial do not reveal an argument about prosecutorial misconduct related to the presentation of this evidence. Defendant therefore has forfeited this issue for review. See *People v. Naylor*, 229 Ill. 2d 584, 592 (2008) (stating if the defendant does not object at trial and include the alleged error in a written posttrial motion, he will forfeit review of the alleged error on appeal). Anticipating a possible forfeiture, even though he initially argued the contention of error was preserved for review, defendant asserts we may review it under the plain-error doctrine.

¶ 51 Under the plain-error doctrine, we may review an unpreserved contention of error when there was a clear or obvious error, and either (1) the evidence was so closely balanced that the error itself threatened to tip the scales of justice against the defendant, regardless of the gravity of the error, or (2) the error was so serious that it resulted in an unfair trial to the defendant and challenged the integrity of the judicial process, regardless of the closeness of the evidence.

People v. Coats, 2018 IL 121926, ¶ 9. The defendant has the burden to show that an error constitutes plain error. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). The first step in any plain-error analysis is to determine whether a clear or obvious error occurred. *People v. Sebby*, 2017 IL 119445, ¶ 49.

¶ 52 Although as previously mentioned, defendant has conceded that, based on what the State presented to the trial court before trial, the court did not err in granting the State's motion *in limine*, we still must delve into the issue of the pretrial admissibility of the gang evidence briefly in order to provide context for defendant's ultimate prosecutorial misconduct argument.

¶ 53 Generally, if evidence is relevant, that evidence is admissible at trial. Ill. R. Evid. 402 (eff. Jan. 1, 2011). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan. 1, 2011). However, relevant evidence will be inadmissible if the probative value of the evidence is substantially outweighed by the risk of unfair prejudice. Ill. R. Evid. 403 (eff. Jan. 1, 2011). Evidence that the defendant is a member of a gang can be especially prejudicial given the "strong prejudice against street gangs," particularly in metropolitan areas. *People v. Smith*, 141 Ill. 2d 40, 58 (1990). Our supreme court has held "any evidence which tends to show that an accused had a motive for killing the deceased is relevant because it renders more probable that the accused did kill the deceased." *Id.* at 56. And evidence of gang membership is generally "admissible to show common purpose or design, or to provide a motive for an otherwise inexplicable act." *Id.* at 58. However, such evidence is only admissible if there is sufficient proof that membership in a gang was related to the crime charged. *People v. Villarreal*, 198 Ill. 2d 209, 232 (2001). Where there is no clear connection between the defendant's membership in a gang and the crime charged, the only

purpose of presenting such evidence is to inflame the passions and arouse the prejudice of the jury. *People v. Roman*, 2013 IL App (1st) 110882, ¶ 25.

¶ 54 In this case, the evidence of defendant's membership in the Unknown Vice Lords and the simmering feud between the gangs helped explain to the jury why defendant would have targeted Darryl Porter, a member of the Traveling Vice Lords, who happened to be on a street corner selling drugs. See *Smith*, 141 Ill. 2d at 56 (any evidence that shows the defendant had a motive to commit the offense charged is relevant). And in the process of targeting Porter, defendant shot and killed Bennett, who happened to be on the corner with Porter. Absent this gang evidence, Bennett's death would have been incapable of being explained, and as such, the evidence had the tendency to prove it was more likely that defendant murdered Bennett than it would have been without the evidence. See *id.* Moreover, while there was no evidence presented that defendant was involved in the escalating tensions between the two gangs, in allowing the State to admit the evidence, the trial court pointed out that, due to the nature of gang conflicts and the loyalty of gang members to their own gangs, it was unnecessary to have evidence that defendant was directly involved in the events leading to the shooting. Therefore, the gang evidence was relevant.

¶ 55 Although gang evidence can be especially prejudicial given how the public generally views gangs (see *id.* at 58), here, the probative value of the evidence was not substantially outweighed by the risk of unfair prejudice. As previously discussed, defendant's involvement in the Unknown Vice Lords was highly probative as to why he shot his firearm in the direction of Porter and Bennett. There was undoubtedly some prejudice to defendant given the connotation to gangs, but the evidence was not overly prejudicial and unfair given that, according to the State, the evidence would be elicited principally through Toney and possibly Porter. The court

understood that the gang evidence would be limited to testimony that defendant was a gang member and there was a simmering feud between the gangs. In this manner, the State would elicit enough evidence of defendant's membership in the Unknown Vice Lords and the escalating tension between his gang and the Traveling Vice Lords to provide context for an otherwise unexplainable shooting, but not an overwhelming amount of evidence to unfairly prejudice him. Consequently, we agree with defendant that, based on what the State presented to the trial court before trial, the court did not err in granting the State's motion *in limine*.

¶ 56 Despite defendant's concession, he argues that the State committed misconduct when it became apparent that its reasons offered in support of its pretrial motion *in limine* were pretextual and merely a way to inject prejudicial and incompetent evidence into his trial. "Generally, while any evidence which tends to show that an accused had a motive for killing the deceased is relevant, such evidence, to be competent, must at least to a slight degree tend to establish the existence of the motive relied on." *People v. Stewart*, 105 Ill. 2d 22, 56, 85 (1984). Defendant posits that, while the evidence may have been properly allowed before trial based on what the State presented to the trial court, it became improper when the State's evidence at trial failed to establish to a slight degree the existence of the motive relied on. We review whether alleged misconduct by the State warrants a new trial *de novo*. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007).

¶ 57 First, defendant asserts that the State failed to even establish that he was a member of a gang. Citing to *People v. Lucas*, 151 Ill. 2d 461, 479 (1992), defendant posits that Toney's bare assertion that he was a member of the Unknown Vice Lords was insufficient to establish that he belonged to the gang. Rather, citing to *People v. Williams*, 262 Ill. App. 3d 808, 820 (1994), defendant asserts that the State could only show he was a member of a gang through his own

admission, through evidence he shouted a gang slogan before the shooting, or through expert testimony from a police officer specializing in gangs.

¶ 58 In *Lucas*, our supreme court never made an explicit statement that the bare assertion of a lay witness that the defendant belonged to a gang was inadequate to prove that he did, in fact, belong to a gang. Rather, that statement came from *Williams*, 262 Ill. App. 3d at 820, citing to *Lucas*, 151 Ill. 2d at 479. However, that statement in *Williams* is not an accurate reading of *Lucas*. As this court detailed in *People v. Campbell*, 2012 IL App (1st) 101249, ¶ 24, "our supreme court did not hold that the testimony of a lay witness regarding a defendant's gang membership was insufficient to prove that fact in either *Lucas* or [*People v. Easley*, 148 Ill. 2d 281 (1992))], but instead applied the established standard regarding such evidence by considering whether the evidence was related to the crime charged and relevant to an issue in dispute and weighing its probative value against its prejudicial effect." Thus, merely because Toney, a lay witness, was the only person to testify that defendant was a member of a gang did not mean that the evidence automatically became inadmissible. Rather, the trial court was required to balance the probative value of that evidence against its prejudice. And, here, the trial court did just that and found the evidence admissible, fully knowing that Toney might be the only witness to identify defendant as a gang member, which the State mentioned during argument on its pretrial motion *in limine*.

¶ 59 But even if we were to agree with defendant that the bare assertion of a lay witness declaring the defendant belonged to a gang was insufficient to prove he did, in fact, belong to a gang, Toney's testimony was not merely a bare assertion. Toney testified extensively about his relationship with defendant, from going to school together to being involved in rival gangs, and coupled that testimony with his extensive knowledge about the simmering feud between the

Traveling Vice Lords and Unknown Vice Lords, from their respective territories to the events that ultimately culminated in Bennett's death. Thus, it can hardly be said that Toney's testimony about defendant's involvement in a gang was a bare assertion.

¶ 60 Defendant further argues that the State failed to sufficiently connect the escalating gang tensions with the shooting that killed Bennett. He asserts that the evidence only showed the shooting was related to competition in the drug trade, highlighting that, based on Toney's testimony, the Unknown Vice Lords and the Traveling Vice Lords were actually working together. While it is true that Toney, a member of the Traveling Vice Lords, testified that he was selling drugs with "Joe Blow," a member of the Unknown Vice Lords, Toney's testimony showed that the gang feud was between a faction of Unknown Vice Lords, the faction north of the expressway, and the Traveling Vice Lords. Likewise, defendant's argument overlooks the connection between the drug trade and gang activity, as detailed by Toney, who testified that the violent feud between the gangs stemmed from gang members driving by rival members and flashing money they had obtained from selling drugs. Based on Toney's testimony, the escalating tensions were directly related to both gang and drug activity.

¶ 61 Additionally, defendant posits that Toney's testimony about the escalating feud, including his recitation of the champagne-spraying incident and the earlier shootings, was hearsay because he admitted he was not present for them. We will discuss the alleged hearsay issue more fully in connection with defendant's later contention that his trial counsel provided ineffective assistance by failing to object to this testimony, but for now, suffice to say, trial counsel made no objection to Toney's testimony on any of these instances. Assuming *arguendo* that his testimony was hearsay, "[i]t is well established that when hearsay evidence is admitted

without an objection, it is to be considered and given its natural and probative effect." *People v. Banks*, 378 Ill. App. 3d 856, 861 (2007).

¶ 62 Lastly, defendant asserts that the State never connected him to any of the earlier incidents described by Toney and cites to *People v. Smith*, 141 Ill. 2d 40 (1990) for support that, because of the insufficient connection, the State should not have been allowed to use the gang feud to support its alleged motive. In *Smith*, the defendant allegedly killed an assistant warden of Pontiac Correctional Center outside of a bar. *Id.* at 47-50. The State's theory was that the defendant was a member of the King Cobras gang and killed the assistant warden at the behest of the leader of the King Cobra's in retaliation for the assistant warden's refusal to tolerate gang activity in prison. *Id.* at 58. To support this theory and show that the defendant had a motive to commit the murder, the State presented testimony over the defendant's objection from another assistant warden of the prison that: several years prior to the assistant warden's death, he had an altercation with the leader of the King Cobra's at Stateville Correctional Center; there was rampant gang activity in the prison system; and the assistant warden did not tolerate the gang activity. *Id.* at 51-52. However, the only evidence presented by the State that the defendant was a gang member was that, one time, he had been seen in an apartment with the leader of the King Cobra's, the leader was influential in the area where the shooting occurred and the defendant was seen talking to the gang leader at the time of his arrest. *Id.* at 59.

¶ 63 However, our supreme court found the admission of the gang evidence improper because the evidence was entirely insufficient to support an inference that the defendant was an active member of the King Cobras or that he "was acting pursuant to the alleged vengeful designs of [the leader of the King Cobras] or the King Cobras at the time he allegedly killed [the assistant warden]." *Id.* Because the gang evidence was "simply too slim a thread upon which to tie the

State's theory of motive," the gang-related evidence offered little probative value and should not have been admitted at trial. *Id.* at 59-60.

¶ 64 In *Smith*, the defendant's alleged gang membership was based an inference, or rather guilt by association, which is vastly different than the instant case. Here, there was direct evidence from Toney, who had known defendant since high school and testified that defendant was a member of the Unknown Vice Lords. *Smith* is therefore inapposite.

¶ 65 In sum, based on what the trial court knew, it properly allowed the gang evidence to be admitted at trial, and the State committed no misconduct when it introduced that gang evidence at trial through Toney. Therefore, no plain error occurred. *People v. Bannister*, 232 Ill. 2d 52, 71 (2008) (where there is no error, there can be no plain error).

¶ 66 2. Opening Statement and Closing Argument

¶ 67 Defendant next contends that the State committed misconduct when it repeatedly relied on the unsupported and emotionally-laden "gang warfare" theory during its opening statement and closing argument. Although defendant couches this argument as compounding the admission of the improper gang evidence, which we have just concluded was not improper, he also insinuates that the improper comments were themselves reversible error due to being inflammatory and distracting the jury from a proper consideration of the issues presented.

¶ 68 We note that defendant only objected to, and included in his posttrial motions, the alleged improper comment in the State's opening statement where it remarked that Tyrone Bennett "became the latest statistic in Chicago's culture of senseless gang violence." The remaining references to gang warfare and violence in closing argument were not objected to by defendant, though they were generally included in posttrial motions, meaning they have been forfeited on

appeal. See *Naylor*, 229 Ill. 2d at 592-93. Consequently, one of defendant's alleged errors has been preserved for review while the rest have not.

¶ 69 The critical difference between preserved error and unpreserved error is the burden to show the error's impact. *People v. Donahue*, 2014 IL App (1st) 120163, ¶ 111. In preserved error, the State has the burden to show that the error did not prejudice the defendant, or rather that it was harmless. *People v. McLaurin*, 235 Ill. 2d 478, 495 (2009). In unpreserved error, where the plain-error doctrine applies, the defendant has the burden to show that the clear or obvious error prejudiced him. *Id.* But axiomatically, there must be an error before the reviewing court determines the impact of the error. We therefore begin by determining whether the State's references to gang warfare and violence in its opening statement and closing argument were error.

¶ 70 During an opening statement and a closing argument, the State generally has wide latitude in discussing the case. *Wheeler*, 226 Ill. 2d at 123; *People v. Pasch*, 152 Ill. 2d 133, 184 (1992). The purpose of an opening statement is to allow a party to discuss the facts and issues of the case concisely. *People v. Jones*, 2016 IL App (1st) 141008, ¶ 22. It should not become argumentative. *Id.* The State, however, may discuss the evidence that will be presented and matters that may be reasonably inferred from that evidence. *Smith*, 141 Ill. 2d at 63. The purpose of a closing argument is to allow a party to review the evidence presented at trial, discuss the applicable law, and argue how the law and evidence compel a verdict in its favor. *People v. Nicholas*, 218 Ill. 2d 104, 121. During closing argument, argument is obviously permissible. *People v. Smith*, 2017 IL App (1st) 143728, ¶ 75. In a closing argument, the State may again comment on the evidence presented at trial and draw reasonable inferences from that evidence, even if they reflect poorly on the defendant. *Nicholas*, 218 Ill. 2d at 121. Given the limitations

imposed on a party during an opening statement compared to a closing argument, the latitude afforded to the State during an opening statement may not be as great as the latitude afforded to it during a closing argument. *Smith*, 2017 IL App (1st) 143728, ¶ 48. "In other words, statements made during an opening statement may be improper where those same statements may be proper during a closing argument." *Jones*, 2016 IL App (1st) 141008, ¶ 21. Remarks in either an opening statement or a closing argument that are only intended "to arouse the prejudice and passion of the jury are improper." *Id.* Both remarks made in an opening statement and those made during a closing argument must viewed not in isolation, but in the context of the entire argument. *People v. Thompson*, 2016 IL App (1st) 133648, ¶ 47.

¶ 71 Previously, this court has stated that a conflict exists regarding the proper standard of review concerning the alleged impropriety of remarks made during an opening statement and closing argument. See *People v. Deramus*, 2014 IL App (1st) 130995, ¶ 35; *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 32. However, in *People v. Cook*, 2018 IL App (1st) 142134, ¶¶ 63-64, this court resolved that apparent conflict, asserting that we review whether remarks made during a opening statement and closing argument were improper for an abuse of discretion but we review whether improper remarks were so egregious to warrant a new trial *de novo*. Because the initial question is whether the State's remarks were improper at all, we review this for an abuse of discretion.

¶ 72 The first comment at issue occurred during the State's opening statement where it remarked that Tyrone Bennett "became the latest statistic in Chicago's culture of senseless gang violence." Defendant argues that the comment was improper because the State failed to introduce any competent evidence to establish he was a gang member.

¶ 73 "Generally, while any evidence which tends to show that an accused had a motive for killing the deceased is relevant, such evidence, to be competent, must at least to a slight degree tend to establish the existence of the motive relied on." *Stewart*, 105 Ill. 2d at 85. As we have already discussed, Toney's testimony identifying defendant as a gang member and describing the escalating gang feud that existed between the Traveling Vice Lords and Unknown Vice Lords was relevant and tended to establish the existence of the motive relied on. Thus, contrary to defendant's argument, there was competent evidence establishing that defendant was a gang member. Moreover, the State's comment was proper as it was merely previewing the case, namely that Tyrone Bennett was killed as a result of a gang feud. Consequently, there was nothing improper about the State's opening statement.

¶ 74 The next comments at issue occurred during the State's closing argument, where it began argument by focusing the jury on "the world of gang warfare on the west side of the City of Chicago." The State reminded the jury how the case began, by rival gang members "flashing" money and then spraying champagne on one another, which escalated into violence with firearms. The State subsequently remarked that "the face of gang warfare sits right across the courtroom from you" in defendant because he was the one who armed himself with a firearm, drove into the territory of a rival gang and began shooting, which resulted in Bennett's death. Later, the State returned to Bennett, who it called a "victim of gang warfare" and "collateral damage in a war" wherein "[i]nnocent victims" were killed. And in talking about the west side of Chicago, the State reiterated that it was "a gang and drug infested area." After arguing to the jury that the identifications of defendant were reliable, the State stated: "People cannot be gunned down in the street because they live and have the misfortune of living in drug infested and gang infested areas. We cannot allow for collateral damage to occur on our streets." The State

immediately told the jury that it had the opportunity to tell defendant that Bennett "was not collateral damage and his life mattered." The State concluded that it could turn that opportunity into action by finding defendant guilty of first-degree murder.

¶ 75 In rebuttal closing argument, the State reiterated many of the comments and arguments it made during its opening statement and closing argument. The State repeated to the jury that Bennett "became a statistic in the senseless gang violence on the streets of Chicago." And then near the conclusion of its argument, the State further remarked that, if the jury found defendant guilty, it would "tell the defendant no. No more shooting. No more murder. Not on the streets of our city. Not on the streets of our country. Not on the streets of our state."

¶ 76 Defendant argues these remarks were improper and prejudicial because they invited the jury to send a message against crime generally and prevent future innocent victims of gang shootings by returning a guilty verdict against him.

¶ 77 We find all of the State's arguments proper. When gang evidence and the defendant's membership in a gang are properly admitted during trial, which was the case here, the State may comment on that evidence during closing argument. *People v. Resendez*, 273 Ill. App. 3d 751, 760 (1995). Furthermore, the State's comments during closing argument were either based on the evidence presented or reasonable inferences therefrom. Merely because they reflect poorly on defendant does not make them improper. See *Nicholas*, 218 Ill. 2d at 121. The evidence at trial revealed a simmering feud between the Unknown Vice Lords and the Traveling Vice Lords that culminated with multiple shootings back and forth, all occurring in the west side of Chicago. And the State argued that its evidence showed that defendant was the individual who shot and killed Bennett during the gang feud. It was not unreasonable to characterize the feud between the gangs, in which multiple shootings occurred that left one person dead, as a gang war. See

Jackson, 2018 IL App (1st) 150487, ¶ 42 (finding the State's characterization of an area of Chicago as "warzone reminiscent of Baghdad" during closing argument, though colorful, was a "fair description" based on the evidence presented at trial that there was a gunfight between two gangs); *Resendez*, 273 Ill. App. 3d at 760 (finding the State's comments during closing argument proper when it stated there was a " 'gang war' " occurring in Chicago " 'on our streets' " between the Latin Kings and Satan Disciples and "innocent people get killed when they get caught in 'gang warfare' and 'gang banging' "). Similarly, it was a fair comment based on Toney's testimony about the presence of gangs and drug dealing that the area where the shooting occurred was infested with drug dealing and gang activity.

¶ 78 Although the State's closing argument was sharp and forthright, it was not like the one deemed improper by our supreme court in *People v. Johnson*, 208 Ill. 2d 53, 79 (2003), as defendant suggests. In *Johnson*, the court condemned certain arguments imploring juries to send a message by their verdicts, specifically where the State makes "an extended and general denunciation of society's ills" and focuses the jury on "[t]he broader problems of crime in society." *Id.* at 77-79. According to our supreme court, these arguments are improper because they "interject[] matters that have no real bearing upon the case at hand" and "seek[] to incite the jury to act out of undifferentiated passion and outrage, rather than reason and deliberation." *Id.* at 79. But the court noted that arguments are proper where they are "*limited* prosecutorial exhortations" and "it is made clear to the jury that its ability to effect general and specific deterrence is dependent solely upon its careful consideration of the specific facts and issues before it." (Emphasis in original.) *Id.*

¶ 79 The latter is what occurred in this case, where the State briefly remarked that innocent people cannot be killed in the street just because they happen to live in areas where gangs are

prevalent. See *People v. Jackson*, 391 Ill. App. 3d 11, 40 (2009) (finding that "isolated remarks relating to the jury's ability to effect specific and general deterrence based on [the] defendant's culpability" do not compare to the comments condemned in *Johnson* and therefore are proper in a closing argument). But most importantly, the State specifically tied its comments to defendant. In the State's closing argument, it told the jury that a guilty verdict would tell *defendant* that Bennett's life mattered and he was not collateral damage. In its rebuttal closing argument, the State remarked that, if the jury found defendant guilty, it would send a message *to him* that there would be no more shootings and murders. See *Johnson*, 208 Ill. 2d at 79 (distinguishing the State's improper argument in its case from a proper one where the State "concluded with specificity" and tied its brief remarks about crime in general to the particular defendant). Consequently, there was nothing improper about the State's closing argument.

¶ 80 In sum, there was nothing improper about the State's opening statement or its closing argument. And accordingly, where the State properly presented the gang evidence at trial and did not exceed the bounds of a proper opening statement or closing argument, defendant was not denied a fair trial.

¶ 81 But even assuming *arguendo* that the State presented incompetent gang evidence and compounded that presentation through an improper opening statement and closing argument, defendant would not have met his burden to show these errors were plain error. See *Hillier*, 237 Ill. 2d at 545. The two prongs of the plain-error doctrine are that either (1) the evidence was so closely balanced that the error itself threatened to tip the scales of justice against the defendant, regardless of the gravity of the error, or (2) the error was so serious that it resulted in an unfair trial to the defendant and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *Coats*, 2018 IL 121926, ¶ 9. Under the first prong, the State's case had

multiple witnesses identify defendant as either the shooter or the individual in the red van. Although two of those witnesses recanted their identifications and there was no physical evidence connecting defendant to the shooting, the strength of the remaining identifications of defendant are simply too strong to say this case was closely balanced.

¶ 82 Under the second prong, defendant has cited no case where a court found second-prong plain error under similar circumstances. He does cite *People v. Blue*, 189 Ill. 2d 99, 138 (2000) to illustrate that prosecutorial misconduct can result in second-prong plain error because, in that case, our supreme court stated that when determining whether a defendant's right to a fair trial had been violated under a cumulative error theory, it would undertake the same test used for a second-prong plain-error analysis. But *Blue* is hardly like the present case. In *Blue*, the State introduced into evidence a police officer's bloodied and brain-matter-stained uniform, which had been ripped from the officer's body during attempted life-saving treatment. *Id.* at 120. The State further draped the uniform on a mannequin in the courtroom during its case-in-chief. *Id.* at 121. In addition, the State attempted to introduce evidence into trial through "testifying" objections and shouted at a defense witness in open court. *Id.* at 136, 141. In closing argument, the State appealed to the jury's emotions with extensive pleas to provide justice for the officer's family and invited the jury to show its appreciation for the police by convicting the defendant. *Id.* at 130-34. Nothing close to what occurred in *Blue* occurred in this case. As such, had we found errors by the State, we would have found that defendant failed to meet his burden to show the errors were plain errors. Similarly, as we observed that this case was not closely balanced, we would also have found that defendant's alleged preserved error regarding improper comments by the State during opening statements would have been harmless.

¶ 83 B. Ineffective Assistance of Trial Counsel

¶ 84 Defendant next contends that his trial counsel provided ineffective assistance in several ways. First, defendant argues that counsel performed deficiently when he failed to object to parts of Saquan Toney's testimony, including his testimony that defendant was a gang member and about the pre-shooting incidents, which defendant asserts were inadmissible hearsay. Second, defendant argues that counsel performed deficiently when he failed to move for a mistrial once the State's reasons for introducing the gang evidence unraveled during trial and where the State unfairly prejudiced him during its opening statement and closing argument.

¶ 85 Initially, defendant acknowledges that he arguably forfeited this contention where, although he argued his trial counsel was ineffective in posttrial motions, he did not raise the specific argument about failing to object to Toney's alleged hearsay testimony and failing to move for a mistrial. See *People v. Keys*, 195 Ill. App. 3d 370, 372, 376 (1990) (finding the defendant forfeited his contention that his trial counsel was ineffective for failing to make a demand for a speedy trial where the attorney who failed to make the demand had withdrawn from the case prior to trial and the defendant's subsequent attorney failed to allege the ineffectiveness of the defendant's first attorney). Defendant, however, asserts that we may review the contention of error under the plain-error doctrine because if his trial counsel was ineffective, the plain-error doctrine is automatically implicated. See *People v. Wood*, 2014 IL App (1st) 121408, ¶ 56 (stating that "claims of ineffective assistance and the plain-error rule overlap because a successful claim of ineffective assistance of counsel would necessarily satisfy the second prong of the plain-error rule"). Because if defendant can prove that his trial counsel provided ineffective assistance, he will have proven plain error, we will determine whether or not trial counsel provided ineffective assistance to defendant.

¶ 86 All defendants have a constitutional right to receive the effective assistance of counsel. U.S. Const., amends. VI, XIV; Ill. Const. 1970, art. I § 8; *People v. Peterson*, 2017 IL 120331, ¶ 79. Effective assistance of counsel means "reasonable, not perfect, representation." *People v. Wilborn*, 2011 IL App (1st) 092802, ¶ 79. For a defendant to prevail on a claim of ineffective assistance of counsel, he must satisfy the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and establish that (1) his counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable probability that, absent counsel's deficient performance, the result of the trial would have been different. *Peterson*, 2017 IL 120331, ¶ 79. The failure to establish either prong is fatal to a claim of ineffective assistance of counsel. *People v. Richardson*, 189 Ill. 2d 401, 411 (2000).

¶ 87 Hearsay is an out-of-court statement offered into evidence to prove the truth of the matter asserted. *People v. Caffey*, 205 Ill. 2d 52, 88 (2001); Ill. R. Evid. 801(c) (eff. Jan. 1, 2011). A statement is an oral or written assertion, or non-verbal conduct of a person if it is intended by the person as an assertion. Ill. R. Evid. 801(a) (eff. Jan. 1, 2011). Due to its lack of reliability, hearsay evidence is generally inadmissible unless it falls within an exception to the hearsay rule. *Caffey*, 205 Ill. 2d at 88.

¶ 88 Concerning defendant's first claim that Toney's testimony about defendant being a gang member was inadmissible hearsay, we disagree. When Toney was asked during trial if he knew whether defendant belonged to a gang, Toney responded that defendant was a member of the Unknown Vice Lords. As noted by the State, there is nothing to suggest that Toney's answer was hearsay. Importantly, in his answer to the question, Toney did not reference an out-of-court declarant, an out-of-court conversation or an out-of-court statement. Toney's testimony that defendant was a member of the Unknown Vice Lords was therefore not hearsay, and trial

counsel could not have performed deficiently by failing to make a futile objection. See *People v. Lawton*, 212 Ill. 2d 285, 304 (2004).

¶ 89 Concerning defendant's second claim that Toney's testimony about the escalating events of violence that led to Bennett's murder was inadmissible hearsay, we also disagree. Toney was merely testifying to events he knew occurred. Instructive is *People v. Heard*, 187 Ill. 2d 36, 64-65 (1999), where the defendant contended that his trial counsel was ineffective for failing to object to an alleged hearsay statement from the mother of a murder victim, who testified that her son had bought a gun after the defendant began calling their house incessantly. Our supreme court found "[t]he fact that [the victim] bought a gun is not hearsay because it was not a statement. [The victim's mother] merely testified as to what *she* knew-that [her son] bought a gun. In this regard, [the mother] did not testify as to any out-of-court statements made by [her son]." (Emphasis in original.) *Id.* at 65. Similarly, Toney did not testify to any out-of-court statements by anyone, but rather testified to what *he knew*, that there were various incidents between his gang, the Traveling Vice Lords, and a faction of Unknown Vice Lords. Because Toney's testimony in this regard was not hearsay, trial counsel could not have performed deficiently by failing to object on hearsay grounds, which would have been a futile objection. See *Lawton*, 212 Ill. 2d at 304.

¶ 90 Furthermore, as we have already determined that the admission of the gang evidence was proper and the State did not make any improper remarks during its opening statement or closing argument, trial counsel could not have performed deficiently by failing to move for a mistrial. See *People v. Patterson*, 217 Ill. 2d 407, 438 (2005) (counsel is not required to make futile motions). And because counsel did not perform deficiently in any of the above regards, he did not provide ineffective assistance of counsel (see *Richardson*, 189 Ill. 2d at 411), and no plain

error occurred. See *People v. Cooper*, 132 Ill. 2d 347, 358 (1989) (no plain error occurred where the defendant argues, but fails to prove, his counsel provided ineffective assistance).

¶ 91 Lastly, defendant also argues that his posttrial counsel was ineffective for failing to argue that his trial counsel was ineffective in the above regards. However, because trial counsel was not ineffective, posttrial counsel was not required to include such an argument in a posttrial motion. See *Patterson*, 217 Ill. 2d at 438.

¶ 92 C. Newly Discovered Evidence

¶ 93 Defendant lastly contends that the trial court erred in denying his motions for new trial where the newly discovered evidence—eyewitnesses Dwayne Combs, Darius Combs and Larry Matthews, who testified after trial that defendant was not the shooter—contradicted the State's witnesses who identified him as the shooter and supported Darryl Porter's trial testimony that he was not the shooter.

¶ 94 Initially, the State points out that defendant did not make this claim in the trial court, but rather argued that trial counsel had been ineffective for failing to interview Dwayne before trial, who then would have led counsel to Darius and Matthews. The State therefore asserts that defendant is precluded from raising this argument on appeal for the first time.

¶ 95 "It is axiomatic that arguments may not be raised for the first time on appeal." *People v. Estrada*, 394 Ill. App. 3d 611, 626 (2009). The importance of defendant's failure to raise the argument in the trial court is that different elements must be established to grant a new trial based on ineffective assistance of trial counsel as compared to a new trial based on newly discovered evidence. As previously discussed, ineffective assistance of counsel claims are governed by the *Strickland* standard where the defendant must establish that (1) his counsel's performance fell below an objective standard of reasonableness and (2) there is a reasonable

probability that, absent counsel's deficient performance, the result of the trial would have been different. *Peterson*, 2017 IL 120331, ¶ 79. Conversely, newly discovered evidence will warrant a new trial only when the evidence: (1) is of such a nature that it would likely change the verdict on retrial; (2) is material, but not cumulative; and (3) has been discovered after trial and could not have been discovered earlier with the exercise of due diligence. *People v. Smith*, 177 Ill. 2d 53, 82 (1997). Notably, we review the trial court's denial of a motion for new trial based on newly discovered evidence for an abuse of discretion. *People v. Gabriel*, 398 Ill. App. 3d 332, 350 (2010).

¶ 96 But because in the trial court, defendant claimed his trial counsel had been ineffective for failing to interview Dwayne prior to trial, the trial court operated under the test established by *Strickland*. To this end, the court concluded its remarks when denying defendant's motions for new trial by stating that his trial counsel was "excellent," "far from ineffective" and "clearly overwhelmingly went beyond the standards set forth in the *Stickland* matter." The court did not operate under the standard in *Smith*, meaning the court did not determine precisely whether the evidence was of such a nature that it would likely change the verdict on retrial, whether the evidence was material, but not cumulative, and whether the evidence had been discovered after trial and could not have been discovered earlier through the exercise of due diligence. See *Smith*, 177 Ill. 2d at 82. While the court's analysis might have tangentially covered matters that would be included in an analysis of a motion for new trial based on newly discovered evidence, the court was not focused on that claim. And because defendant did not advance that argument to the court, he necessarily did not ask the court to utilize its discretion to determine whether a new trial was warranted based on newly discovered evidence. See *Phillips v. DePaul University*, 2014 IL App (1st) 122817, ¶ 91 (although in the civil context, holding the trial court cannot be said to

have abused its discretion when it was never asked to exercise its discretion in a particular manner); *Matanky Realty Group, Inc. v. Katris*, 367 Ill. App. 3d 839, 844 (2006) (same).

¶ 97 Generally, the way around forfeiture of arguments raised for the first time on appeal is to argue that the defendant's attorney was ineffective for failing to raise the argument in the trial court or by invoking the plain-error doctrine. But defendant has not done either here, so we will honor defendant's forfeiture and not address this contention of error.

¶ 98 III. CONCLUSION

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

¶ 100 Affirmed.