2016 IL App (1st) 14-1353-U

No. 1-14-1353

Third Division
September 21, 2016

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IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of Cook County.
Plaintiff-Appellee,	)	
	)	No. 10 CR 3215
v.	)	
	)	Honorable
DORENZO MOORE,	)	Angela Munari Petrone,
	)	Judge, presiding.
Defendant-Appellant.	)	

JUSTICE COBBS delivered the judgment of the court.
Presiding Justice Fitzgerald Smith and Justice Pucinski concurred in the judgment.

O R D E R

¶ 1 *Held*: Defendant's counsel at retrial was not ineffective where defendant cannot establish he was prejudiced from any of the alleged errors due to the substantial evidence against him provided by four eyewitnesses. Defendant cannot establish prejudice from the State's improper closing argument.

¶ 2 The State charged defendant Dorenzo Moore with attempted murder, aggravated battery with a firearm, and armed robbery in connection with the shooting of Derrick Agee on October 11, 2009. The case proceeded to a jury trial at which defendant was acquitted of the attempted murder charge; however, the jury was unable to reach a verdict on the remaining

charges. The trial court declared a mistrial and ordered a retrial of the aggravated battery with a firearm and armed robbery charges. Following retrial, the jury convicted defendant of the aggravated battery with a firearm charge and acquitted defendant of the armed robbery charge. Defendant appeals contending that his counsel at retrial was ineffective because counsel failed to impeach several witnesses with prior inconsistent statements. Defendant further asserts that counsel should have requested that the jury be instructed with Illinois Pattern Instruction 3.11 (Illinois Pattern Jury Instructions, Criminal, No 3.11 (4th ed. 2000), which provides guidance on the use of prior inconsistent statements as substantive and impeachment evidence. Defendant additionally argues that counsel was ineffective for failing to object when the State improperly elicited a prior consistent statement and when the State allegedly made improper comments during closing arguments. In addition, defendant asserts that the State improperly elicited a prior consistent statement, made an improper closing argument by suggesting that other evidence of defendant's guilt existed, and that defendant's sentence is excessive. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 After the conclusion of the first trial, defense counsel withdrew as defendant's attorney and defendant retained new counsel. His new counsel motioned to quash defendant's arrest and suppress evidence, which the court denied. Prior to the second trial, Harold Tate, one of the eyewitnesses from the first trial, died. The court granted the State’s request to have his testimony from the first trial read into the record and the case proceeded to retrial.

¶ 5 At retrial, Brian McGee, Derrick Agee, and Anita Marshall testified for the State. Tate’s testimony from the first trial, at which he testified for the State, was also presented. They each testified that they were working security at the Island City Social Club located at 1956

West 51st Street, Chicago, Illinois on the night of October 10th into the early morning of October 11, 2009. That night, McGee was standing outside of the club on 51st Street by the exit door and Marshall, Agee, and Tate were stationed on 51st Street by the entrance, which was in the gangway next to the club. They were responsible for checking patrons and collecting money as they arrived. Marshall was standing to McGee's right, Agee was standing to the right of Marshall, and Tate was standing to the right of Agee. They each testified that there was a streetlight close to the club providing clear visibility in the area. Agee testified that at approximately 3 a.m., defendant arrived in a car, spoke to another man, and then walked up to him. McGee, Tate, and Agee recognized defendant as a regular patron of the club. They also testified that the night before the incident, on October 9th, defendant was removed from the club because he was involved in an altercation.

¶ 6 As defendant approached, Agee asked him "What's up, bro?" and defendant said, "This is what's up" and put a dark revolver to Agee's head. Defendant was holding the gun in his left hand and was wearing a glove. Agee knocked defendant's hand and began to "tussle" with him. They moved about one or two feet away into the gangway. When Tate saw the gun, he ran west to Damen toward a restaurant across the street. Marshall stood back outside of the gangway and McGee ran into the club. Agee pushed defendant off him and ran down the gangway. When Agee reached five or six feet into the gangway, he heard gunshots and his left leg gave out causing him to fall face first into the concrete. As Agee was lying face-down in the gangway he heard someone approach from behind and say "Give me the money." Agee recognized the voice to be defendant's. Agee reached inside his pockets and pulled out money and defendant pulled money out of Agee's pockets at the same time. Agee had $120

of personal money and approximately $200 to $300 of the club's money. Defendant took the money and left the gangway.

¶ 7 When McGee and Tate heard a gunshot they returned to the area. McGee, Tate, and Marshall saw defendant leave the gangway, walk south across the street, and then walk toward Damen Avenue with a black gun in his hands. Thereafter, the paramedics arrived and attended to Agee. At some point, police officers arrived and briefly spoke with Agee before he was taken to the hospital. The officers also spoke to Marshall and McGee, who told them that defendant was wearing a red jacket, dark jeans, and a red hat with his hair in a ponytail.

¶ 8 Detective John Foster testified that on October 11, 2009, he was assigned to a case of a man shot at 1956 West 51st Street. When he arrived at the scene, other police officers informed him that Agee had been shot and had already been taken to the hospital. He briefly spoke to McGee and Marshall and determined that a revolver had been used in the shooting. McGee described the shooter as a skinny black man and approximately six feet tall. He also told Foster that the shooter was wearing red clothing and had a scar on his nose. Marshall described the shooter as a black man in his early thirties, tall, and wearing red. Marshall did not tell Foster that she had seen defendant at the club earlier that night. Neither Tate nor Agee gave officers a description of the shooter that night, however, both described the shooter to Foster at a later date.

¶ 9 Approximately two weeks after the incident, Tate called Foster and identified himself as a witness to the shooting. Tate stated that he had seen defendant at the liquor store across the street from the club. During that conversation, he told Foster that defendant's name was "Zo" or "Lorenzo" and that he knew him from the neighborhood. Foster then generated a photo array based on the information he received from Tate. Thereafter, Foster met with Tate at

65th and Western and showed him the array, which did not include defendant. Tate was unable to identify anyone from that array. Subsequently, Tate called Foster a second time and informed him that he had seen defendant again at the liquor store across the street. Tate told Foster that defendant drove a blue Oldsmobile and gave Foster the license plate number. During the second phone conversation, Tate also told Foster that defendant's name was actually "Dorenzo." Foster ran the plate number and learned that the car was a blue Oldsmobile Aurora registered to defendant. Foster then created another photo array that included defendant. Tate met with Foster again on January 10, 2010, and was shown the second set of photographs, from which he identified defendant.

¶ 10 Defendant was subsequently arrested. The Chicago Police Department contacted McGee, Agee, and Tate on January 30, 2010, and asked them to go to the police station where they independently viewed a physical line-up. Each witness identified defendant as the shooter. Prior to viewing the line-up, the witnesses had spoken to police officers. They did not speak to any other witnesses until after viewing the line-up.

¶ 11 On cross-examination Foster testified that McGee told him the night of the incident that McGee had removed defendant from the club the night before, but did not tell Foster that defendant was a regular at the club. Neither McGee nor Marshall told Foster that they had observed defendant take money from Agee at that time. When Foster first spoke to Agee, Agee did not give a description of the shooter nor did he tell Foster that the shooter had taken money from him. Foster testified that there was nothing in his written reports that indicates the shooter took money from Agee. Foster also testified that when Tate first called him he did not provide a description. Rather, he stated that he knew the shooter had a blue car.

Additionally, McGee was the only witness that told Foster that the shooter had a scar on his nose.

¶ 12 Officer Sego testified on behalf of the defense that on October 11, 2009, he was called to 1956 West 51st Street based on a report that a person was shot. When he arrived, he observed a male victim lying in the gangway being treated by paramedics. Sego testified that he spoke to McGee who described the shooter as male, black, 5 feet 10 inches, 170 pounds, brown eyes, black hair, ponytail, medium brown complexion, and between 28 to 32 years of age. McGee also stated that the shooter was wearing a red leather jacket. McGee did not give him a name, did not tell him that the shooter had arrived in a car, or that the shooter had a scar on his nose. McGee also did not tell him that any money had been taken.

¶ 13 Defendant presented Justin Williams, Herman Norris, and Alvin Wright as alibi witnesses. They each testified that they were with defendant at a birthday party the night of the shooting. Williams testified that he is defendant's brother. On October 10, 2009, he and defendant attended a birthday party for their younger brother, Booker Pierce. Pierce's birthday is October 10th, so it was his birthday that day. The party took place at their mother's house located at 116th Street and Wallace. Williams arrived at approximately 5 p.m. and the party began around 8 p.m. Williams testified that defendant arrived at the party approximately two hours later. Prior to the party starting, defendant set up music equipment. The party ended at approximately 2 a.m., however, not everyone left at that time. Williams did not see defendant leave at any point during the party. Williams further testified that defendant was still at the party after 2 a.m. and was the DJ the entire time. Defendant lived at the house and went to his room at approximately 3:30 a.m. On cross-examination Williams testified that the party was planned about six or seven hours in advance. He admitted that

people were drinking alcohol and smoking marijuana at the party. Williams further admitted that he and defendant grew up in the area of 51st Street and Damen Avenue and frequented the liquor store located there. He conceded that he did not contact the police to inform them that defendant was at the party that night and not at the Island City Social Club.

¶ 14 Norris testified that on October 10, 2009, he was with his girlfriend during the day. She dropped him off at the party at 116th Street and Wallace at approximately 10 p.m. Defendant, Williams, and Wright were at the party when he arrived. Defendant was the DJ that night. The party lasted until 3 or 4 in the morning, but it started to clear out around 2 or 3 a.m. Norris left around 3:00 or 4:00 a.m. He did not see defendant leave the party at any time. Norris admitted that he did not contact police to inform them that defendant was at the party on the early morning of October 11, 2009.

¶ 15 Wright testified that on October 10, 2009, there was a party planned for defendant's brother. Defendant came to pick Wright up around 5 p.m. They went to get something to eat and then went to defendant's house. They put up decorations and set up speakers and radio equipment because defendant was the DJ for the party. Defendant began playing music around 8 p.m. At approximately 2 a.m. most, but not all, of the guests left. At that time, defendant still had music playing and people were mingling. Wright stayed the night and did not leave the party. He did not see defendant leave the party at any point that night. Wright testified that he saw defendant every day and they went to clubs together. They went to the Island City Social Club together one time. On cross-examination Wright testified that they had planned the party weeks in advance. In addition, Wright admitted that he never contacted the police to tell them that defendant was at the party and not at the Island City Social Club the morning of October 11, 2009.

¶ 16 Defendant testified in his own defense. He stated that he is familiar with the Island City Social Club because it is located in the area where he grew up and he went there once when it first opened. On October 10, 2009, defendant was at home when his brother Pierce informed him that it was his birthday. Defendant decided to throw Pierce a birthday party and called friends to invite them to the house that night. Pierce, Wright, and defendant's cousins helped plan the party. At approximately 1 or 2 p.m, defendant went to the store to buy lights. He went back to the house to drop things off and then left again to pick up Wright. They returned to the house around 5 p.m. to prepare for the party, which started around 9 p.m. Defendant was the DJ for the party. He "started to let the guests go home" between 1 and 2 a.m. but the party continued until approximately 4 a.m. Defendant testified that he never left the party and that he was at no point at 1956 West 51st Street and that he did not have a gun in his possession that day.

¶ 17 Defendant admitted on cross-examination that he grew up in the area of 51st Street and Damen Avenue and that he continued to frequent the neighborhood. He had been to the liquor store across from the Island City Social Club multiple times. Defendant further admitted that he drove a blue Aurora Oldsmobile and that in October of 2009 he wore his hair in a ponytail.

¶ 18 After closing arguments the jury found defendant guilty of aggravated battery with a firearm and not guilty of armed robbery. The trial court sentenced defendant to 25 years in prison for the aggravated battery with a firearm conviction.

¶ 19 ANALYSIS

¶ 20 I. Ineffective Assistance of Counsel

¶ 21 Defendant first contends that his counsel on retrial was ineffective because he failed to impeach witnesses with prior inconsistent statements, failed to request that the jury be instructed with IPI 3.11, failed to object to the State improperly eliciting prior consistent statements, and failed to object to the State's improper closing argument. The State responds that counsel was not ineffective but pursued reasonable trial strategy, and even if counsel was unreasonable, defendant cannot establish prejudice.

¶ 22 To prove ineffective assistance, a defendant must show that "counsel's representation fell below an objective standard of reasonableness and that counsel's shortcomings were so serious as to 'deprive the defendant of a fair trial, whose result is reasonable.' " *People v. Albanese*, 104 Ill. 2d 504, 524 (1984) (quoting *Strickland v. Washington*, 466 U.S. 668, 687 (1984)). The court indulges a strong presumption that an attorney's conduct falls within a wide range of reasonable professional conduct. *Albanese*, 104 Ill. 2d at 526. We consider the totality of the circumstances in determining whether counsel was ineffective and we recognize that a defendant is entitled to competent, but not perfect representation. *People v. Valladares*, 2013 IL App (1st) 112010, ¶ 52. " 'Mistakes in trial strategy or tactics or in judgment do not of themselves render the representation incompetent.' " *Id.* (quoting *People v. Hillenbrand*, 121 Ill. 2d 537, 548 (1988)). To establish prejudice, the defendant must show that a reasonable probability exists that the result of trial likely would have been different but for the alleged ineffective representation. *People v. Hale*, 2013 IL 113140, ¶ 18. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* In analyzing an ineffective assistance of counsel claim, we may proceed directly to the prejudice prong without discussing whether counsel's performance was ineffective. *Id.* ¶ 17.

¶ 23 A. Impeachment

¶ 24 Defendant argues that counsel should have impeached McGee, Agee, Marshall, and Foster with prior inconsistent statements. The State responds that then scope of cross-examination is a matter of trial strategy and does not support a finding of ineffective assistance of counsel. Generally, the manner in which a witness is cross-examined is a matter of trial strategy. *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). However, failure to impeach a witness with a prior inconsistent statement can result in ineffective assistance where the failure to do so undermines the outcome of the proceeding. See *People v. Williams*, 329 Ill. App. 3d 846, 857 (2002); *People v. Garza*, 180 Ill. App. 3d 263 (1989).

¶ 25 Defendant asserts that McGee failed to include the fact that the shooter had a scar on his nose in his description at the first trial, and therefore, when he testified as such at the second trial, defense counsel should have impeached McGee by omission. "[I]it is permissible to use a witness' prior silence to discredit his testimony if: (1) it is shown that the witness had an opportunity to make a statement, and (2) under the circumstances, a person normally would have made the statement." *Williams*, 329 Ill. App. 3d at 854.

¶ 26 At the first trial, McGee was asked various questions about defendant's appearance such as how many times he had seen defendant prior to the shooting, what defendant was wearing, defendant's hairstyle, and defendant's complexion. He was not asked to give a general description of defendant or specifically about his face. Thus, McGee provided answers to the questions he was asked. Due to the manner of questioning, he did not have an opportunity to testify to any other characteristics of defendant's appearance that he had noticed, including that he had a scar on his nose. In contrast, at retrial, McGee was asked whether he noticed anything about what defendant was wearing, if he noticed anything about defendant's hair, and if he noticed anything about defendant's face. The last question prompted McGee to state

that defendant had a scar on his nose. Because McGee lacked the opportunity to testify to the scar at the first trial, his testimony from that trial was not legally inconsistent with his testimony at the second trial. Accordingly, counsel was reasonable and not ineffective for failing to impeach McGee on this matter.

¶ 27 Moreover, even if it was a mistake for counsel to not impeach McGee with testimony from the first trial, defendant would not be able to show prejudice. Defendant contends that the evidence in this case is closely balanced as demonstrated by the fact that there was a hung jury in the first trial. We disagree and reject defendant's unsupported contention. Rather, the evidence establishes that there were four eyewitnesses in this case who each testified that defendant was the man who shot Agee. Their version of events is remarkably consistent. McGee, Marshall, Tate, and Agee each testified that at approximately 3 a.m., a black man wearing red clothing, with a ponytail, approached Agee. They heard Agee ask "What’s up, bro?" and then heard the man say "This is what’s up." They each testified that defendant pulled a dark gun from his left side and put it to Agee’s head. Agee hit the gun away and began to tussle with defendant moving into the gangway. Soon after, they heard a gunshot. Although McGee and Tate briefly ran away and Marshall did not enter the gangway, they each quickly returned to the scene and saw the man running south and toward Damen Avenue with a gun in his hand. McGee, Tate, and Agee testified that they recognized defendant because he was a regular at the club and had been removed the night before and they each independently identified defendant as the shooter at a physical line-up. Subsequently, Marshall also identified defendant as the shooter. Each of these witnesses had a clear opportunity to view defendant the night of the incident as defendant went directly over to the well-lit area where they were standing. They were working security and were

focused on the patrons coming to the club, including defendant. Defendant stood face-to-face with Agee and within feet of the other witnesses. Although defendant asserts that the witnesses could not agree on the shooter's height and age, we find their descriptions that ranged from 5 feet 8 inches to six feet tall and between 20 to 32 years old substantially consistent considering they each described the shooter as a tall skinny black man wearing red clothing, with his hair in a ponytail. In addition, each witness was certain that defendant was the shooter as they repeatedly identified him. " 'A single witness' identification of the accused is sufficient to sustain a conviction if the witnesses viewed the accused under circumstances permitting a positive identification.' " *People v. Williams*, 2015 IL App (1st) 131103, ¶ 69 (quoting *People v. Slim*, 127 Ill. 2d 302, 307 (1989)). In this case, there were four positive identifications.

¶ 28 Furthermore, counsel confronted McGee at length about his failure to provide the officers with a name or initially tell them defendant was a regular. Counsel also pointed out weaknesses in McGee's ability to observe the shooter because he was about seven feet away and ran inside the club during the actual shooting. Therefore, McGee was not presented to the jury without any adversarial testing. Accordingly, because the evidence of defendant's guilt was substantial, counsel's error did not undermine the outcome and defendant cannot establish prejudice from his failure to impeach McGee with his prior testimony.

¶ 29 Defendant cites *People v. Garza*, 180 Ill. App. 3d 263 (1989), to support his proposition that failing to impeach a witness with a prior inconsistent statement amounts to ineffective assistance. We find *Garza* distinguishable from this case. In *Garza*, the only evidence linking the defendant to the crime was a sole eyewitness. *Id.* at 269. That eyewitness initially told detectives that the attacker "had blue eyes and a scar over the eyes," but later changed her

description and said that she had actually been describing the victim. *Id.* at 266. During the investigation, a detective noticed discrepancies in her description and questioned her about them. *Id*. During questioning, the eyewitness informed the detective that the defendant had a possible scar on his arm above a tattoo. *Id.* The eyewitness did not include these characteristics in her description at trial. *Id.* Despite the significant differences in her description in the police reports and at trial, defense counsel did not impeach her with this information. *Id.* Ultimately, the jury found the defendant guilty of murder. *Id.* Upon retaining new counsel, the defendant presented a motion for a new trial based, in part, on the detective's notes. *Id.* The defendant argued that his counsel was ineffective for failing to impeach the eyewitness with the prior inconsistent statements. *Id.* at 267. The court agreed stating, "she was not confronted with her prior descriptions of the offender, particularly that in which she described the assailant as having the scar over one of his eyes as well as a scar and tattoo on one of his arms." *Id.* at 269. The court found it significant that the proof against the defendant was not overwhelming or enormous but was closely balanced. *Id.* Given that there was only one eyewitness, it was critical for defense counsel to inform the jury of the discrepancies in her description so that it could adequately weigh credibility. *Id.* at 269-70.

¶ 30 In contrast, here there were four eyewitnesses who positively identified defendant. Unlike in *Garza*–where the witness informed police of multiple identifying marks such as scars and tattoos and then gave a description at trial that did not include any of them–none of the alleged inconsistencies here are so substantial that they would have completely undermined the jury's ability to weigh the witnesses' credibility. "[M]inor testimonial discrepancies and inconsistencies do not undercut the testimony to where it is unworthy of belief, but go only to its weight." *People v. Cannon,* 150 Ill. App. 3d 1009, 1019 (1986). Even if counsel had

successfully impeached McGee, there were other eyewitnesses who identified defendant. Accordingly, we disagree with defendant that the evidence in this case was closely balanced, and find that the evidence against defendant was overwhelming.

¶ 31 Defendant additionally argues that counsel should have impeached Foster with his testimony from the first trial where he did not state that McGee told him that defendant had a scar on his nose. At the first trial, regarding McGee's description, Foster was asked, "How did he describe – what was the height and weight of the person?" Foster answered, "male Black, tall and skinny. I know he had a clothing description." At retrial, Foster was asked "[D]uring your conversation with McGee, did he give you a general description of the offender?" McGee answered, "Male black in his 20s, skinny. Had some kind of red clothing on, and a -- Mr. McGee remembered a scar on his nose." Thus, at the first trial, Foster was not asked to give the general description that McGee had given him. Rather, he was asked only for the height and weight. Foster's answer, however, went beyond the scope of the question and included other characteristics of defendant. Consequently, in this circumstance, it is difficult to conclude that Foster did not have the opportunity to provide McGee's description of the scar, and that an officer would not have normally included this information. Regardless of whether counsel could have impeached by omission and should have impeached by omission, defendant cannot establish prejudice from this alleged mistake. As discussed above, there were four eyewitnesses in this case who made strong identifications of defendant. The result of trial would not have changed had counsel questioned Foster on his prior testimony.

¶ 32 Similarly, defendant asserts that counsel should have impeached Foster with his testimony from the first trial that Marshall described the shooter as having facial hair because

Marshall did not include facial hair in her description of the shooter at retrial and Foster did not testify at retrial that the description Marshall gave him the night of the shooting included facial hair. At that trial, Foster was asked on cross-examination how Marshall had described the shooter and Foster stated "she described him as five eight, skinny, with a red jacket and a ponytail." Defense counsel then asked: "Facial hair?" and Foster responded "Facial hair." At retrial, Foster was again asked how Marshall described the shooter the night of the incident. Foster stated that she described the shooter as "Male black, early 30s, tall, red garment and hair in a ponytail." Thus, Foster was never specifically asked whether she described the shooter as having facial hair. Foster was asked about her general description, however, so he had the opportunity to mention that her description included facial hair. Further, we believe that a police officer normally would relay a witness's full description and not leave out an important identifying characteristic. Thus, counsel could have impeached Foster with this omission. Nevertheless, we need not determine whether counsel's failure to impeach in this manner was valid trial strategy because it is apparent that the result of trial likely would not have changed had counsel done so. Foster's omission at the second trial was not significant. The information regarding defendant's facial hair was based on a description that was given, not by Foster, but by Marshall. Thus, impeachment could have highlighted a difference in the officer's testimony, but it would not have directly undermined an eyewitness' description. As stated above, the evidence against defendant was overwhelming as there were multiple eyewitness identifications. Accordingly, defendant cannot establish that he was prejudiced from this alleged error.

¶ 33 Defendant also argues that Marshall should have been impeached with the prior description she gave Foster the night of the shooting that included facial hair. We note that

Marshall did not testify at the first trial. At retrial, Marshall was asked specific questions about defendant's appearance including what he was wearing and his hairstyle. She was never asked to describe his face or whether he had facial hair. Thus, her testimony on retrial was not inconsistent with the description she gave Foster the night of the shooting. Had counsel asked her whether she noticed something about defendant's face, then it is possible that she would have given an inconsistent statement, but it is equally possible that she would have testified consistently. We note that Foster never stated what type of facial hair Marshall said she saw, thus its impact on defendant's appearance and consequently her identification, is uncertain. Accordingly, counsel was not unreasonable for failing to impeach Marshall in this manner.

¶ 34 Defendant next argues that Agee did not testify that defendant arrived at the club in a car at the first trial and therefore his counsel should have impeached Agee with this omission at retrial. Although Agee testified that defendant arrived in a car, Agee was adamant that he did not remember what kind of car it was or who was driving the car. There was no evidence linking the car Agee arrived in that night to the car that Tate subsequently saw at the liquor store across the street. Importantly, Agee's statement that defendant arrived in a car does not substantively change his testimony that defendant arrived at the club around 3 a.m. and approached him with a gun. Thus, whether or not defendant arrived in a car was not material. In order to impeach with a prior inconsistent statement, the contradictory statement "must have the reasonable tendency to discredit a witness' testimony on a material matter." *People v. Larry*, 218 Ill App. 3d 658, 666 (1991). Moreover, Agee's testimony that defendant arrived in a car did not contradict his testimony at the first trial where defendant did not

mention the mode by which defendant arrived at the club. Thus, counsel was reasonable in not attempting to impeach McGee with his prior trial testimony.

¶ 35 Defendant makes the additional argument that Foster should have been impeached with a prior inconsistent statement that he made at the pretrial suppression hearing. Specifically, defendant asserts that Foster testified at retrial that in his first conversation with Tate, Tate said the shooter's name was Lorenzo and that he drove a blue car, but at the pretrial suppression hearing Foster affirmatively stated that Tate did not say anything about a blue car in their first conversation. This argument misapprehends the record. Foster did not state at retrial that Tate conveyed to him in their first conversation that defendant owned a blue car. Rather, Foster testified that he first received information about the blue car on November 11, 2009, when Foster met with Tate in person and showed him the first photo array. Thus, this statement is not inconsistent with his prior testimony that he did not learn anything about a blue car in his first conversation with Tate, which occurred over the phone. Moreover, whether Tate mentioned the blue car in the first or second conversation is of little consequence in light of the overwhelming evidence of defendant's guilt. Minor discrepancies do not completely discredit testimony, but go to its weight. *Cannon,* 150 Ill. App. 3d at 1019.

¶ 36 B. Failure to Request IPI 3.11

¶ 37 Defendant next contends that counsel was ineffective for failing to request that the jury be instructed with IPI 3.11, which guides the jury on the use of prior inconsistent statements. See Illinois Pattern Jury Instructions, Criminal, No. 3.11 (4th ed. 2000). The State responds that IPI 3.11 would have been inappropriate because defense counsel failed to actually impeach any of the witnesses with prior inconsistent statements. IPI 3.11 provides:

"The believability of a witness may be challenged by evidence that on some former occasion he [(made a statement) (acted in a manner)] that was not consistent with his testimony in this case. Evidence of this kind [ordinarily] may be considered by you only for the limited purpose of deciding the weight to be given the testimony you heard from the witness in this courtroom. [However, you may consider a witness's earlier inconsistent statement as evidence without this limitation when

[1] the statement was made under oath at a [(trial) (hearing) (proceeding)].

[or]

[2] the statement narrates, describes, or explains an event or condition the witness had personal knowledge of;

and

[a] the statement was written or signed by the witness.

[or]

[b] the witness acknowledged under oath that he made the statement.

[or]

[c] the statement was accurately recorded by a tape recorder, videotape recording, or a similar electronic means of sound recording.]

It is for you to determine [whether the witness made the earlier statement, and, if so] what weight should be given to that statement. In determining the weight to be given to an earlier statement, you should consider all of the circumstances under which it was made." Illinois Pattern Jury Instructions, Criminal, No. 3.11 (4th ed. 2000).

¶ 38 Here defendant's theory of the case was that he was not at the Island City Social Club but was instead at a party at his mother's house in a different neighborhood. The credibility of the State's witnesses and their ability to identify the shooter was of great significance. In fact,

it is apparent from the record that defense counsel’s strategy was to attack the credibility of these witnesses by highlighting prior inconsistent statements from the police reports. Counsel questioned McGee regarding the fact that he did not initially tell police officers that defendant was a regular; he questioned Agee about the fact that he did not initially provide police officers with a description of defendant or tell them that money had been stolen; and Marshall was questioned about her failure to tell the police officers that she saw defendant at the club earlier that night. Thus, if counsel had requested IPI 3.11, it would have been appropriate to be given. *People v. Eggert*, 324 Ill. App. 3d 79, 82 (2001).

¶ 39 Further, it is evident from the record that counsel's failure to request IPI 3.11 was not based on trial strategy. Defense counsel recognized that it was crucial to the defense that the jury understand that it could use prior inconsistent statements in the police reports to weigh the witnesses' credibility. He even requested that the court give a limiting instruction that informed the jury that the police reports could be used for this purpose. When the court informed counsel that it was not aware of an appropriate IPI that would address this issue, however, counsel did not provide IPI 3.11.

¶ 40 As defendant points out, *People v. Eggert*, 324 Ill. App. 3d 79, 82 (2001), holds that giving the jury IPI 1.02 (Illinois Pattern Jury Instructions, Criminal, No. 1.02 (4th ed. 2000)), which addresses weighing the credibility of witnesses generally, does not cure the failure to give IPI 3.11 in certain circumstances. Here, however, we need not determine if not requesting IPI 3.11 was unreasonable, because we will only find ineffective assistance where there is a reasonable probability that the outcome of trial would have changed had the jury been correctly instructed. *Hale*, 2013 IL 113140, ¶ 18. As discussed above, the evidence against defendant was substantial. Although the defense attempted to attack the witnesses'

credibility, other than Agee's failure to promptly inform the police that money was stolen, none of the prior inconsistent statements that counsel actually put before the jury significantly discredited the witnesses' testimony. The witnesses' failure to immediately inform the police that the defendant was a regular was explained by the fact that the conversations with police the night of the shooting were brief and they did not know defendant's name at that time. In addition, although they neglected to promptly state that defendant was a regular, the witnesses did inform the police that the shooter had been involved in an altercation at the club the night before. Therefore, defendant cannot establish prejudice from counsel's failure to request IPI 3.11, which is required for a successful ineffective assistance claim.

¶ 41 C. Sego's Cross-Examination

¶ 42 Defendant next asserts that counsel was ineffective for failing to object when the State elicited prior consistent statements during the cross-examination of Sego. Specifically, defendant argues that the State’s reference to the plural "witnesses" at the scene instead of "a witness" at the scene implied prior consistent statements from other unknown witnesses. He further argues that this implication tended to strengthen McGee’s testimony because it suggested that multiple witnesses told Sego the same information that McGee had relayed to him. We disagree with defendant's characterization of the evidence. It is apparent from the record that Sego only spoke to McGee. He testified that his partner obtained information from Marshall. We do not believe the jury was confused by the State’s use of the plural "witnesses." Thus, the State did not actually elicit an improper prior consistent statement.

¶ 43 Defendant also briefly argues that this statement was inadmissible hearsay. As we conclude that it is clear from the record that McGee was the only witness who spoke to Sego,

we reject the argument that the statement was hearsay from unknown witnesses. We also reject the argument that the questioning went beyond the scope of direct examination as it is completely without merit. "Defense counsel is not required to make losing motions or objections in order to provide effective legal assistance." *People v. Moore*, 2012 IL App (1st) 100857, ¶ 45. Thus, counsel was not ineffective for failing to object to the State's cross-examination of Sego.

¶ 44 D. Closing Arguments

¶ 45 Defendant argues that counsel was ineffective for failing to object to the State's improper closing argument when the State commented that "this is not some big conspiracy." The State asserts that the reference to a conspiracy was in response to defendant's suggestion in closing argument that the eyewitnesses spoke to one another before they viewed the physical line-up. During closing argument, defense counsel stated:

> "And you heard testimony very interesting because some people say well no we want to sit in a room together before we went to look at the lineup. But even Detective Foster himself says I placed everybody in the room together before they went and looked at the line up. That should I submit cause you to question what was transpiring here."

In rebuttal the prosecutor responded:

> "And you heard from [Agee]. He didn't even see anybody really in between this time. This is not some big conspiracy to pin it on this defendant. It's they all [identified] him because it is this defendant. It was this defendant out there that shot [Agee] and robbed him. And no they don't know his name.
>
> ***

> "Now counsel brought up all this bad police work. Well, it's not in the report. They all sat in a room together in a lineup. What was the insinuation. Insinuations are not evidence. They are not all sitting in a room. They are not all saying hey we all know that he is going to be seated in number four in this line-up. They didn't know if he was going to be in. There is conspiracy by the police. There is no conspiracy by these four people who only worked for a short period of time with each other to pin it on the defendant. The defendant did it."

¶ 46 We note that a prosecutor is afforded wide latitude in making closing and rebuttal arguments. *People v. Glasper*, 234 Ill.2d 173, 204 (2009). In rebuttal, a prosecutor may respond to comments by defense counsel that invoke a response. *People v. Thompson*, 2015 IL App (1st) 122265, ¶ 39. Nevertheless, it is improper for a prosecutor to distort the burden of proof by suggesting that a jury must find that the State's witnesses were lying in order to acquit the defendant. *People v. Wilson*, 199 Ill. App. 3d 792, 796 (1990). In determining whether a prosecutor's comments were improper, we look to the context by examining the entire closing arguments of both sides. *Id.*

¶ 47 Upon examination of the entire closing arguments of both sides, it is clear that the prosecutor in this case was responding to comments made by defense counsel implying that the witnesses spoke to each other about the identity of defendant before they viewed the line-up. Defense counsel's suggestion that the line-up was improper and the identifications were tainted invited a response from the prosecutor. In addition, viewing the comments in context, the prosecutor did not shift the burden of proof by suggesting that the jury needed to find a conspiracy in order to acquit defendant. Rather, in response to defendant's suggestion, the

prosecutor highlighted the evidence presented at trial that the witnesses did not talk to each other before viewing the line-up and that they each positively identified defendant.

¶ 48 II. Prosecutorial Misconduct

¶ 49 Similar to the arguments of ineffective assistance of counsel, defendant asserts claims of prosecutorial misconduct, alleging that the State (1) incorrectly stated the law regarding the use of police reports, (2) improperly argued that the defense's theory of the case was that the witnesses had conspired against defendant, and (3) misstated evidence, thereby bolstering the strength of Tate's identification. Defendant acknowledges that counsel failed to object in the lower court to the prosecutor's misstating the defense theory of the case and misstating the evidence, and therefore these arguments normally would be forfeited. *People v Enoch*, 122 Ill. 2d 176, 186 (1988). He argues, however, that these claims should be reviewed for plain-error. The State maintains that there was no error below and that even if there was error, this case is not closely balanced.

¶ 50 "The plain-error rule bypasses normal forfeiture principles and permits a reviewing court to consider unpreserved error in certain circumstances." *People v. Campbell*, 2012 IL App (1st) 101249, ¶ 20. Under the plain-error doctrine, a reviewing court may review otherwise forfeited errors when: (1) a clear or obvious error occurred and the evidence is closely balanced, regardless of the seriousness of the error or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial, regardless of the closeness of the evidence. *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). The first step in conducting plain-error review is to determine whether error has occurred. *Id.*

¶ 51 Defendant's argument on appeal that his claims against the state should be reviewed for plain-error is based upon the case being closely balanced. He does not argue that there was a

serious error that affected the fairness of his trial and that these claims should be reviewed under the second prong. As discussed above, this case was not closely balanced. There were four eyewitness identifications of defendant, providing substantial evidence of his guilt. Thus, the plain-error doctrine does not allow us to review defendant's claim that the State improperly argued that the defense theory of the case was conspiracy and that it misstated evidence. Thus, we will only address defendant's argument that the State misstated the law regarding police reports, which was preserved.

¶ 52 Defendant contends that the State misstated the law on the use of police reports in closing argument by informing the jury that they are not evidence. The State responds that the prosecutor accurately related the law because police reports are not evidence and thus there was no misconduct. Although a prosecutor is given wide latitude in closing arguments, he cannot misstate the law. *People v. Jackson*, 2012 IL App (1st) 092833, ¶ 36. Generally, police reports are not admissible for substantive evidence but can used for impeachment. *People v. Sheif*, 312 Ill. App. 3d 673, 679-80 (2000). The question of whether a prosecutor's statement is so egregious that it warrants a new trial is a legal issue, which this court will review *de novo. People v. Wheeler*, 226 Ill. 2d 92, 121 (2007).

¶ 53 Here, during closing arguments defense counsel stated:

> "And Detective Foster told you that from that witness stand that Mr. Tate allegedly told him that he knew this person from of [*sic*] of the neighborhood. But when I questioned Detective Foster about that and asked him did he include that in the reports he prepared in connection with [*sic*] matter, he could not recall and certainly did not notice anywhere that this person told him that he knew the guy from the neighborhood."

In rebuttal, the prosecutor argued:

"PROSECUTOR: And just because things are not in a police report doesn't mean they don't happen. Everybody takes notes differently. Everybody writes things down differently. I might wright [*sic*] something down that you don't write down but doesn't mean it didn't happen. It doesn't mean somebody didn't say it. This whole thing is about the police reports. Police Reports are not evidence.

DEFENSE COUNSEL: Objection, judge.

THE COURT: Overruled. You may continue.

PROSECUTOR: Police reports are not evidence. If they were evidence, I'd make everyone of you a copy. I'd hand them to you.

DEFENSE COUNSEL: Objection, judge.

THE COURT: Ladies and gentleman, any statement made that is not based on the law may be disregarded by you. You may continue.

PROSECUTOR: Thank you. Hand them to you and say now you read them. Now, you think the defendant is guilty. I wouldn't have to put any witnesses on the stand. I can just give you the papers. Testimony is evidence. Police reports are not."

¶ 54 Defendant cites *People v. Sheif*, 312 Ill. App. 3d 673 (2000), to support his argument that the prosecutor's comments in this case were improper. In *Shief*, the prosecutor informed the jury that police reports are not evidence and then stated, "You see if I had my way, I would hand you all these police reports and say you go back in there and say he's guilty[.]" In finding these comments were improper, the court explained that "a prosecutor exceeds the bounds of permissible argument where he comments on facts which are inadmissible, or where he suggests that evidence of guilt existed but which, because of its inadmissibility, cannot be heard by the jury. *Id.* at 679.

¶ 55 We agree with defendant that the prosecutor's comments in this case were similar to the improper comments made in *Sheif*. The prosecutor went beyond simply informing the jury that police reports are not evidence. Like the prosecutor in *Shief*, here, the prosecutor implied that there was information in the police reports that he would like to give the jury because if they had that information "you [would] think defendant is guilty," and even stated that he "wouldn't have to put any witnesses on the stand." Therefore, we find that the prosecutor's comments effectively argued to the jury that other evidence of defendant's guilt existed but could not be heard by the jury because it was inadmissible, and therefore the remarks were improper.

¶ 56 Consequently, we must determine whether defendant was prejudiced by the State's argument. A reviewing court will find reversible error from a prosecutor's improper closing statement only where the remarks resulted in a denial of justice or that the verdict resulted from the error. *Campbell*, 2012 IL App (1st) 101249, ¶ 38. A prosecutor's improper remarks do not require reversal unless they result in substantial prejudice to the defendant. *People v. Shaw*, 2016 IL App (4th) 150444, ¶ 70. "In determining whether the requisite substantial prejudice exists, the court must consider the content and context of the language, its relationship to the evidence, and its effect on the defendant's right to a fair and impartial trial." *Shief*, 312 Ill. App. 3d at 680.

¶ 57 Initially, we note that the court's admonishment to the jury to disregard statements not based on the law did not cure the misconduct because the jury was not instructed with IPI 3.11 or any other instruction that would have informed it that police reports could be considered to weigh a witness' credibility. Despite counsel's request that the jury be instructed that police reports could be used in this manner, the court refused to do so, in part

because counsel failed to provide the court with the appropriate instruction. Even so, defendant cannot establish substantial prejudice from the improper remarks. As discussed above, the evidence in this case was overwhelming and we cannot say that the verdict resulted from the prosecutor's comments.

¶ 58 III. Excessive Sentence

¶ 59 Finally, defendant contends that the court abused its discretion in failing to adequately consider mitigating factors at defendant's sentencing hearing. Specifically, defendant argues that the court did not give sufficient weight to his lack of criminal history, his youth, his steady employment, and his involvement in his children's lives. Defendant also alleges that the court failed to consider the financial impact of incarceration. Defendant concedes that this claim was not preserved for review because counsel failed to file a motion to reconsider the sentence. *Enoch*, 122 Ill. 2d at 186-87. He maintains that it should be reviewed under either plain-error or as counsel's ineffective assistance. A claim that a sentence is excessive that would otherwise be forfeited may be reviewed for plain error. *People v. Sauseda*, 2016 IL App (1st) 140134, ¶ 11. The first step in a plain error analysis, however, is determining whether error occurred. *Id.* Here, it is clear the court did not err in sentencing defendant.

¶ 60 In this case, the jury convicted defendant of aggravated battery with a firearm, a Class X felony. 720 ILCS 5/12-4.2 (West 2008). Under section 5-4.5-25(a) of the Illinois Code of Criminal Procedure, (730 ILCS 5/5-4.5-25(a) (West 2008)), the sentencing range for a class X offender is not less than 6 years' and not more than 30 years' imprisonment. Defendant was sentenced to 25 years in prison for the aggravated battery with a firearm conviction, well within the statutory guidelines. At the sentencing hearing the court carefully considered the mitigating and aggravating factors. In fact, the court permitted defendant to amend the

presentence investigation report to include additional employment history and considered that he was financially supporting his children despite the fact that their mother stated she was the sole person who supported them. Additionally, the court stated that it considered all the factors in aggravation and mitigation and thoroughly discussed the information in the PSI report, including that defendant graduated from high school and was not in a gang. In addition, the court acknowledged that defendant had no prior convictions and he was young when he committed the offense. The court noted, however, that Agee was an unarmed security guard and did not provoke the attack. The court stated that "it is a very dangerous situation to go to a club where people are drinking, pull out a gun and start shooting." Additionally, although the court did not mention the financial impact of incarceration, "[i]t is reasonable to presume, absent evidence to the contrary, that the trial court performed its obligations and considered the financial impact statement before sentencing defendant." *People v. Canizalez-Cordena*, 2012 IL App (4th) 110720, ¶ 24. Accordingly, we find no basis upon which to conclude that defendant's sentence was not excessive, and he cannot establish plain error.

¶ 61 CONCLUSION

¶ 62 For the foregoing reasons we affirm the judgment of the trial court.

¶ 63 Affirmed.