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No. 1-10-2411

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County, Illinois,
	)	County Department,
v.	)	Criminal Division.
	)	
DIMITRI BUFFER,	)	No. 09 CR 10493
	)	
Defendant-Appellant.	)	Honorable
	)	Thaddeus L. Wilson,
	)	Judge Presiding.

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JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Presiding Justice Lavin concurred in the judgment.  
Justice Sterba specially concurred.

**ORDER**

¶ 1 *Held:* Because the evidence of the defendant's guilt was overwhelming, the improper introduction of inadmissible prior consistent statements at the defendant's trial did not constitute plain error so as to permit our review. For the same reasons, the defendant failed in his burden to establish that his trial counsel was ineffective for failing to object to the introduction of the prior consistent statements at trial. In light of the overwhelming evidence of his guilt, the defendant has also failed to establish that remarks made by the prosecutor in rebuttal closing argument commenting on the credibility of one of the State's key witnesses could have prejudiced him to such an extent so as to require our review of that issue under the first prong of the plain error doctrine.

¶ 2 Following a jury trial in the circuit court of Cook county, the defendant, Dimitri Buffer, was found guilty of first degree murder and was sentenced to 50 years' imprisonment. On appeal, the defendant contends that he is entitled to a new trial because the circuit court erred in permitting the State to introduce into evidence inadmissible prior consistent statements made by a key witness during his grand jury testimony. The defendant also contends that he was denied a fair trial because of improper remarks made by the Sate in rebuttal closing arguments, which enhanced the credibility of a crucial witness. For the reasons that follow, we affirm.

¶ 3 I. BACKGROUND

¶ 4 On May 16, 2009, the victim Jessica Bazan, was shot while sitting inside her vehicle in front of 8311 South Brandon Avenue. The 16-year-old defendant was charged with six counts of first degree murder, in violation of sections 9-1(a)(1) and 9-1(a)(2) of the Criminal Code of 1961 (Code) (720 ILCS 5/9-1(a)(1), (a)(2) (West 2008)), including that he personally discharged the firearm which caused Bazan's death.<sup>1</sup> The defendant's case proceeded to trial<sup>2</sup> and the following

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<sup>1</sup>We note that several motions were litigated prior to trial, including, *inter alia*: (1) the defendant's motion to suppress a photo identification made by eyewitness, Mark Matthews, which was denied; and (2) the defendant's motion to exclude evidence of his gang affiliation, which was granted in part, precluding the State from offering testimony by gang expert police officers, but allowing testimony from the defendant's fellow gang members regarding his membership in the Black P Stones gang.

<sup>2</sup>On the first day of trial, the parties agreed that the State would *nolle prosee* two of the murder counts and proceeded with only four.

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relevant evidence was adduced.

¶ 5

A. Serena Ortiz

¶ 6

Serena Ortiz first testified that on May 16, 2009, she lived on the second floor of an apartment building at 8311 South Brandon Avenue in Chicago with her seven children. Ortiz was acquainted with the victim, Jessica Bazan, as Bazan was Ortiz's uncle's fiancé. According to Ortiz, at about 10 p.m. on May 16, 2009, she was inside her apartment speaking on the telephone, when her son, Jai Cuevas, walked into the room and told her that Bazan had just pulled up in front of the building in her red Chevrolet Caprice. Ortiz looked out the window and waved to Bazan. Ortiz told Bazan "to hold on" and looked away from the window to finish her telephone conversation. Less than a minute later, she returned to the window and saw a figure in a black hoodie approach Bazan on the front passenger side of the car. Ortiz testified that she next saw two flashes of light and heard Bazan screaming. Ortiz watched the hooded figure run north towards a white car that she described as "a cop car." In court, she identified a photograph of a white Ford Crown Victoria as the vehicle she observed that night. Ortiz further testified that she immediately called out to her boyfriend for help, then dialed 911 and ran downstairs to see if Bazan was alright. Bazan was on the floor and her leg was bleeding. Ortiz's boyfriend took off his shirt and tied it around Bazan's leg to stop the bleeding and they waited for an ambulance.

¶ 7

On cross-examination, Ortiz admitted that when she observed the incident she was inside her second floor apartment. She explained, however, that she was only about 100 feet away from Bazan. She testified that although there was nothing obstructing her view, and there was a street lamp directly above Bazan's car, there was a tree right next to that lamp, which dimmed the lights

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and made the street very dark. Ortiz acknowledged that she was therefore unable to see the hooded figure's face. She also admitted that she never observed a gun in his hands.

¶ 8

B. Jai Cuevas

¶ 9 Ortiz's eleven-year-old son, Jai Cuevas, next testified consistently with Ortiz. He added that after his mother told Bazan to "hold on" while she finished her telephone conversation, he continued to look out the window. Cuevas stated that he observed a man in a black hoodie and black pants "creeping up" to the front passenger side of Bazan's vehicle. When asked to explain what he meant by "creeping up," Cuevas explained that the man was crouching next to the car with both of his hands clasped in front of him and a gun in his hands. Cuevas next observed the man stand up and turn to face the passenger door of Bazan's vehicle. Cuevas saw two flashes of light and heard Bazan screaming. According to Cuevas, the man then ran into a nearby white vehicle, which he entered through the passenger side door. Cuevas described the white vehicle as a "bubble car" and explained that the vehicle had a curved roof. In court, Cuevas then identified a photograph of a white Ford Crown Victoria as the vehicle he observed being used by the offender.

¶ 10 On cross-examination, Cuevas acknowledged that he never saw the offender's face because it was too dark.

¶ 11

C. Dr. Valerie Arangelovich

¶ 12 Assistant Cook County medical examiner, Dr. Valerie Arangelovich, testified that on May 17, 2009, she performed the autopsy on the victim, Jessica Bazan. That autopsy revealed that Bazan had two close-range gunshot wounds on her right thigh. Dr. Arangelovich opined that

those gunshot wounds caused Bazan's death, and that the manner of death was homicide.

¶ 13 D. Sammy Trice

¶ 14 Sammy Trice (hereinafter Trice) next testified that he is a former member of the Black P Stones gang. His 15-year-old cousin,<sup>3</sup> Mark Matthews (hereinafter Matthews), remains a member of the same gang. Trice testified that at about 1:30 p.m. on May 16, 2009, Matthews and a neighbor named Steven Ward (hereinafter Ward) picked him up in Ward's car. Trice described the car as a "white bubble," or "an old police or cab car." He then identified a photograph of the white Ford Crown Victoria previously identified by Oritz and Cuevas as a photograph of Ward's car.

¶ 15 Trice testified that about an hour later, he dropped Matthews off at a nearby basketball court, and went to see his mother. Later that evening, at about 9:30 p.m., he returned to the corner of 82nd Street and Brandon Avenue to pick up Matthews. Matthews was with 14-year-old Devon Brunt (hereinafter Brunt), 16-year-old Devaunte Johnson (hereinafter Johnson), and the defendant. According to Trice, the defendant was wearing a blue hoodie and dark blue pants. All four entered the car. Trice drove the vehicle, Ward sat in the front passenger seat, and Matthews, Brunt, Johnson and the defendant remained in the back, with the defendant right behind Ward and next to the back door.

¶ 16 Trice testified that he then drove the car to an alley on 83rd Street between Coles Avenue

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<sup>3</sup>The record reflects that although Trice and Matthews are cousins, they consider themselves brothers, and often refer to each other as such during trial. Trice's mother, Diane Trice, is also Matthews' guardian.

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and South Shore Drive, so that they could purchase marijuana. Trice explained that the Black P Stones gang uses a vacant house in this alley as a "stash house" to store guns and drugs. Trice further explained that the guns in the house are considered "nation guns," *i.e.*, that they belong to all the gang members and may be used whenever needed. Trice testified that both he and the defendant exited the car in the alley. Trice saw the defendant walk towards the "stash house." He stated that "as far as he knew," the defendant was going "to get the reefer," because he "walked to like a little stash" where the Black P Stones gang kept its marijuana supply. Trice did not, however, see the defendant with any marijuana. When the defendant returned moments later, both he and Trice got back into the vehicle, with Trice in the drivers seat and the defendant in the back seat behind Ward again.

¶ 17 Trice testified that he then proceeded to drive down Brandon Avenue. He stopped at a stop sign to "roll a blunt," when he heard the defendant say "There go them guys right there." Trice saw the defendant exit the vehicle and walk toward the passenger side of a red vehicle parked on Brandon Avenue. Trice watched as the defendant fired three shots at the red vehicle. Trice attempted to drive off, but the defendant ran after the car and jumped inside. Trice "hollered and cursed" at the defendant to get out of the car, and as he pulled into the alley next to Coles Avenue, the defendant jumped out again and ran.

¶ 18 Trice began driving towards his home, and tried to back out of the alley, but saw a police car behind him so he drove north towards 79th Street. Soon thereafter, however, he was pulled over by another police car and all five men in the car were arrested and taken to the police station. Trice was questioned at the police station and identified the defendant as the shooter

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from a photo array. He again identified the defendant as the shooter in open court.

¶ 19 On cross-examination, Trice acknowledged that in 2004 he has was convicted for aggravated robbery and spent time in jail. He also admitted that prior to the shooting on May 16, 2009, he had been drinking and smoking marijuana. Trice further testified that when he was brought to the police station on the evening of May 16, 2009, he believed that he was being arrested for Bazan's murder. He spent the night in an interrogation room, alone, sitting in a chair without water or food. He fell asleep at some point and did not wake up until 7 a.m. the next day when two detectives came in to speak to him. Trice admitted that he initially lied to police about what he saw. He explained that the police told him that both he and his cousin would be charged with murder, and he did not want that to happen. Trice acknowledged that he did not identify the defendant from a photo array until 9:12 a.m. that morning, after speaking to his mother and to the detectives, who told him that his cousin Matthews' story was "falling apart."

¶ 20 On cross-examination, Trice admitted that in June 2009, he came to the courthouse and spoke to "like 12 people" and told them what happened. In response to questions from defense counsel, Trice denied that he told the "12 people" a different story.

¶ 21 On redirect examination, Trice clarified that he was referring to the grand jury and explained that he identified the defendant as the shooter in his grand jury testimony. He then proceeded to repeat his testimony before the grand jury at trial. This testimony was fully consistent with the testimony he had already offered at trial.

¶ 22 E. Mark Matthews

¶ 23 Fifteen-year-old, Matthews, next testified consistent with the testimony of Trice. He first

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admitted that he is a member of the Black P Stones gang. In addition, Matthews testified that on May 14, 2009, two days prior to the shooting of Bazan, he was near a store on 83rd Street and Cottage Grove Avenue in Chicago when he was approached by a group of rival Latin King gang members, who asked him if he was a Black P Stone. Matthews stated that when he answered in the affirmative, they "jumped him," striking him several times and causing multiple abrasions on his face. Matthews admitted that his aunt and guardian and Trice's mother, Diane Trice, later filed a police report about this incident.

¶ 24 With respect to the events of May 16, 2009, Matthews testified that at about 9 p.m., he was playing basketball with Brunt, Johnson, and the defendant when a red car pulled up and several individuals inside, whom Matthews identified as members of the Latin Kings, "threw their gang signs" at them. Soon thereafter, Trice appeared in a white car with Ward. Trice then drove Ward, Matthews, Johnson, Brunt and the defendant to an alley on Coles Avenue where the Black P Stones gang kept their drugs and weapons. Contrary to Trice's testimony, Matthews averred that once in the alley, the defendant, alone, exited the car and returned several minutes later. According to Matthews, Trice then drove the car down Brandon Avenue. When the car stopped at a stop sign, Matthews saw the defendant exit the car, and fire gunshots toward a red car that was parked on the street. Matthews explained that the red car looked like the car belonging to the Latin Kings who had flashed their gang insignia at them earlier that day, but that the Latin Kings' car was darker. According to Matthews, after firing the shots, the defendant returned to Trice's car, but Trice screamed at him to get out and the defendant obeyed.

¶ 25 Matthews further averred that soon thereafter he, Trice, Ward, Johnson and Brunt were



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stopped and arrested by police. They were first taken to Brandon Avenue and told that they had "killed a lady," and then they were handcuffed and taken to the police station. Matthews admitted that he initially lied to the police about who had committed the crime, and implicated James Jones, who is a member of a rival gang, the Apache Stones. He eventually identified the defendant as the shooter and picked him out of a photo array.

¶ 26 On cross-examination, Matthews acknowledged that he spent the entire night at the police station alone in an interrogation room, handcuffed to the wall. Matthews further averred that when he spoke to two detectives in the morning he was told that everyone in Trice's car would be charged with murder. According to Matthews, the police told him that he fit the description of the shooter. Matthews explained that he was then left alone with his guardian and aunt, Diane Trice, and that he initially told her that James Jones, the Apache Stones gang member, was the shooter. Matthews also told his aunt that he never saw the gun, but just flashes of light. Matthews explained that he did not identify the defendant as the shooter until the detectives returned and told him that Trice and Ward did not agree with him that James Jones was the shooter, and that instead, Trice had identified the defendant.

¶ 27 F. Stephen Ward

¶ 28 The State next called Stephen Ward. He testified that in May 2009, he owned a 2003 white Ford Crown Victoria, which he used to "taxi" locals around his neighborhood because regular taxi cab companies did not venture to that area. Ward averred that at about 9 p.m., on May 16, 2009, he loaned his car to Trice, who was a neighbor. With Ward in the passenger seat, Trice drove the car to 79th Street and Brandon Avenue and they picked up Matthews and three

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other individuals whom Ward did not know. According to Ward, one of these men wore a dark hoodie and sat right behind Ward in the back seat of the car. Ward testified that aside from that individual, no one else in the car wore a plain dark hoodie. Ward testified that Trice then drove to an alley between Coles Avenue and Brandon Avenue where the man in the dark hoodie exited the car and returned in about 30 seconds. According to Ward, Trice then proceeded to 83rd Street and Brandon Avenue, where a red sedan passed by their car and parked on Brandon Avenue. At that point, the man in the dark hoodie got out of the car and walked over to the red sedan. Ward saw the man fire multiple shots into the red sedan and then run back to the car. According to Ward, Trice drove the car back to the alley near Coles Avenue and ordered the man in the dark hoodie out of the car. A few minutes later, Trice's car was stopped by the police and all of its occupants were arrested. Ward admitted at trial that when he was arrested he was unable to identify the defendant as the shooter. Ward also did not identify the defendant as the shooter at trial.

¶ 29

G. Aisha Jones

¶ 30 Seventeen-year-old Aisha Jones (hereinafter Jones) next testified that she has known the defendant since she was in sixth or seventh grade, and that he is "like a little brother to her." She explained that the defendant is also close to her own brother, James Jones. At the time of the incident, Aisha Jones was dating the defendant's brother, Melvin Buffer (hereinafter Melvin). Jones also averred that in 2009, both Melvin and the defendant were members of the Black P Stones gang.<sup>4</sup>

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<sup>4</sup>We note that after an objection was made to Jones' testimony regarding the defendant's

¶ 31 Jones next testified about the events of May 16, 2009. She explained that at about 10 p.m. that night she was picked up by Melvin and two other individuals. She and Melvin had intended to go to his place and relax. According to Jones, however, while en route to Melvin's house, Melvin received a telephone call and instead drove to a gas station on the corner of 83rd and Exchange Streets. Once there, Melvin made a second telephone call and then proceeded to the corner of 81st Street and Coles Avenue, where they picked up the defendant. Jones testified that the defendant, who was wearing a navy blue hoodie, got into the back seat of the car and said, "I just shot a [Latin] King in his face." Jones testified that everyone in the car asked the defendant "if he be for real" because the defendant often joked around and was a playful person. The defendant "swore to God" and "on Jeff [Fort, the head of the Black P Stones gang]" that he was telling the truth.

¶ 32 Jones testified that she spent the remainder of the night at Melvin's house with Melvin and the defendant. On the following morning, she woke up around noon and heard the defendant again telling Melvin that "he shot a King in the face." According to Jones, when Melvin mentioned a woman, the defendant told him that he "shot a King" and "didn't shoot no lady."

¶ 33 On cross-examination, Jones explained that she was not concerned about what she had

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gang affiliations, the trial court held a *voir dire* outside the presence of the jury to determine Jones' knowledge of the defendant's gang membership. After some inquiry, the court ruled that Jones could testify regarding the defendant's gang membership. Jones then testified that she had personally observed the defendant attend several meetings of the Black P Stones gang, as well as use various phrases and hand gestures associated with that gang.

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heard the defendant say because he "always play [*sic*] like this."

¶ 34 Jones also admitted that she did not go to the police station to make a statement about what she had heard the defendant say, until later that day when she found out that her brother, James Jones, had been arrested in connection with the shooting. She averred that her brother could not have been involved in the shooting because prior to meeting up with Melvin and the defendant, she had spent the entire evening at a neighborhood tattoo barbecue with her brother.

¶ 35 H. Officer Steven Spremo

¶ 36 Chicago police officer Steven Spremo next testified that on the night of the shooting he was patrolling the south side with his partners Brian Halloran and Ronald Bialota. At around 10 p.m., Officer Spremo was driving eastbound on 83rd Street, and had just turned northward into an alley located between South Shore Drive and Coles Avenue when he observed a white Ford Crown Victoria with four occupants heading north. Officer Spremo decided to follow the vehicle and noted that the first three numbers of its license plate were "841."

¶ 37 Officer Spremo averred that soon thereafter he received a radio call informing him that a person had been shot in the area of 8311 South Brandon Avenue, about two blocks from his current location. Officer Spremo proceeded to the scene of the crime where a witness told him that a white Ford Crown Victoria was involved in the shooting. According to Officer Spremo, Officer Halloran then put out a flash message on the police radio, describing the white Ford Crown Victoria that they had followed in the alley a few minutes before.

¶ 38 I. Officer Joseph Rivera

¶ 39 Chicago police officer Joseph Rivera next testified that on the night in question, he was

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also on patrol in the vicinity of the shooting. While driving around the neighborhood in a marked squad car, he likewise received a dispatch regarding the shooting on 8311 South Brandon Avenue and therefore proceeded towards the scene. Before arriving there, however, he received Officer Halloran's flash message with the description of the white Ford Crown Victorian with the partial plate number "841," and instead decided to drive around the neighborhood looking for the vehicle.

¶ 40 Officer Rivera testified that after driving up to 79th Street, he observed a white Ford Crown Victoria with several occupants inside matching the description and with a license plate beginning with "841." He therefore proceeded to follow the vehicle while calling for backup. When the assisting officers arrived, Officer Rivera activated his squad car's lights and sirens and the Ford Crown Victoria immediately pulled over. All of the occupants of the vehicle, including Trice, Ward, Matthews, Johnson and Brunt, were taken into custody. They were first shown the scene of the crime and then taken to Area 2 police headquarters for interrogation.

¶ 41 J. Detective Michele Moore-Grose

¶ 42 Chicago police detective Michele Moore-Grose next testified that at about 11 p.m. on May 16, 2009, together with her partner Detective William Sullivan she was assigned to investigate the shooting. Detective Moore-Grose testified that with Detective Sullivan she first went to the scene of the crime to interview the responding officers and several witnesses, including Ortiz and Cuevas. The detectives afterwards returned to Area 2 police station to interrogate the five suspects (Trice, Ward, Matthews, Johnson and Brunt) that were arrested in the white Ford Crown Victoria near the scene of the shooting. Detective Moore-Grose

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acknowledged that after speaking to Matthews their investigation first turned towards an individual named, James Jones, whom she arrested on May 17, 2009. She explained, however, that after further interrogation of the witnesses and after speaking to Aisha Jones, their investigation changed course and focused on the defendant.

¶ 43 K. Forensic Testimony

¶ 44 Chicago police evidence technician, Carol O'Donnell, next testified that at about 12:30 a.m. on May 17, 2009, her partner performed gunshot residue testing (GSR) on all five individuals arrested in Trice's vehicle on the night of the shooting (Trice, Brunt, Johnson, Matthews and Ward). Illinois State police analyst, and trace evidence expert, Robert Berk then testified that he analyzed the GSR tests for all five suspects and found none of them to be positive for gunpowder residue.

¶ 45 After Berk's testimony, the State rested and defense counsel filed a motion for a directed finding. That motion was denied by the circuit court. The defense then rested without offering any evidence. After hearing closing arguments, the jury found the defendant guilty of all four counts of first degree murder. The jury also specially found that the defendant had personally discharged the firearm that proximately caused Bazan's death. At a subsequent sentencing hearing, the circuit court merged the four murder counts into one and sentenced the defendant to 50 years' imprisonment with 3 years of mandatory supervised release (MSR). The defendant now appeals.

¶ 46 II. ANALYSIS

¶ 47 A. Prior Consistent Statements

¶ 48 On appeal, the defendant first argues that his conviction should be reversed because the trial court improperly permitted the State to introduce into evidence Trice's prior consistent statements made to the grand jury in order to bolster the credibility of two key eyewitnesses to the shooting, Trice and Matthews. The defendant maintains that the circuit court erred in permitting the admission of the prior consistent statements because those prior consistent statements did not predate the inconsistent statement, and because any motive for Trice to lie existed the entire time he was involved in the case.

¶ 49 The State initially argues that the defendant has waived this issue for purposes of appeal by failing to object to it before the circuit court. In order to preserve an issue for appeal, defendant must first make an objection to the alleged error at trial, and then raise it in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186-87 (1988); see also *People v. Allen*, 222 Ill. 2d 340, 352 (2006) (noting that "even constitutional errors can be forfeited"). The defendant concedes that he failed to properly preserve this issue by failing to object to it at trial. He nevertheless asks this court to review his claim under the plain error doctrine. See Ill. S. Ct. R. 615(a) (eff. Jan. 1, 1967) ("[a]ny error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. *Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the trial court*") (emphasis added); *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005).

¶ 50 The plain error doctrine is a narrow and limited exception to the general rule of forfeiture (*People v. Bowman*, 2012 IL App (1st) 102010, ¶ 29 (citing *Herron*, 215 Ill.2d at 177)), and it "allows a reviewing court to consider unpreserved error when (1) a clear or obvious error

occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007) (citing *Herron*, 215 Ill.2d at 186-87). Under either prong of the plain error doctrine, the burden of persuasion remains on the defendant. *Bowman*, 2012 IL App (1st) 102010 at ¶ 29 (citing *People v. Lewis*, 234 Ill.2d 32, 43 (2009)).

¶ 51 "The first step of plain-error review is to determine whether any error occurred." *Lewis*, 234 Ill. 2d at 43. We will therefore review the defendant's claim to determine if there was any error before considering it under plain error.

¶ 52 We begin by noting that the admission of evidence lies within the sound discretion of the trial court, and a reviewing court will review the trial court's ruling only for an abuse of discretion. *People v. Leak*, 398 Ill. App. 3d 798, 824 (2010). An abuse of discretion occurs "only where the [trial court's] ruling is arbitrary, fanciful, or unreasonable or where no reasonable person would take the view adopted by the trial court." *Leak*, 398 Ill. App. 3d at 824.

¶ 53 The general rule is that prior consistent statements of a witness are inadmissible for the purpose of corroborating the witness's trial testimony or rehabilitating the witness, because they serve to unfairly enhance the credibility of the witness. *People v. McWhite*, 399 Ill. App. 3d 637, 640 (2010); *People v. Donegan*, 2012 IL App (1st) 102325, ¶ 52 (citing *People v. Terry*, 312 Ill. App. 3d 984, 995 (2000)); see also *People v. Johnson*, 2012 IL App (1st) 091730, ¶ 58. The



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reason behind this rule is that: " '[t]he danger in prior consistent statements is that a jury is likely to attach disproportionate significance to them. People tend to believe that which is repeated most often, regardless of its intrinsic merit, and repetition lends credibility to testimony that it might not otherwise deserve.' " *Donegan*, 2012 IL App (1st) 102325 at ¶ 52 (quoting *People v. Smith*, 139 Ill. App. 3d 21, 33 (1985)).

¶ 54 There are two distinct exceptions to this rule, which would permit the introduction of prior consistent statements into evidence at trial: (1) where the witness has a motive to testify falsely, and (2) where there is a charge that the witness has recently fabricated the testimony. *McWhite*, 399 Ill. App. 3d at 641; *Donegan*, 2012 IL App (1st) 102325 at ¶ 52 (citing *People v. Richardson*, 348 Ill. App. 3d 796, 802 (2004)). Under either circumstance, the prior consistent statement must have been made *before* the alleged fabrication or motive to lie arose. *McWhite*, 399 Ill. App. 3d at 641; *Donegan*, 2012 IL App (1st) 102325 at ¶ 52 (citing *Richardson*, 348 Ill. App. 3d at 802).

¶ 55 "Even where admissible, prior consistent statements may only be used for rehabilitative purposes and are not admissible as substantive evidence." *McWhite*, 399 Ill. App. 3d at 641. As our appellate court in *McWhite* explained:

"To be clear, prior consistent statements may not be admitted merely because a witness's testimony has been discredited. [Citations.] Nor may a prior consistent statement be admitted to rebut a charge of mistake, poor recollection, or inaccuracy. [Citation.] Indeed, a prior consistent statement 'carries little rebuttal force' when offered to rehabilitate a witness outside of the two special circumstances of recent fabrication or

motive to lie." *McWhite*, 399 Ill. App. 3d at 641.

See also *Johnson*, 2012 IL App (1st) 091730 at ¶58 ("A prior consistent statement is not rendered admissible merely because the testimony of a witness has been discredited or opposing counsel has sought to challenge his credibility"); *People v. Bobiek*, 271 Ill. App. 3d 239, 244 (1995) ("[W]hen a witness is impeached by the fact that he has contradicted himself by relating the matter in a different way before trial, the admission of other evidence that he had made a pretrial statement at another time consistent with his testimony [at trial] shows only that he had been making different statements about the same matter at a different time, and this would in no way rebut the evidence of his unreliability which is imported by proof of the prior inconsistent statement. [Citation.]"); see also M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 611.14, at 499-500 (9th ed. 2009) ("[I]f a consistent statement does not disprove, explain, or qualify the failure to speak or the making of the inconsistent statements, the consistent statement is not admissible on redirect examination.")

¶ 56 A reviewing court will not reverse a trial court's evidentiary ruling on a prior consistent statement absent an abuse of discretion. *Donegan*, 2012 IL App (1st) 102325 at ¶ 52 (citing *Richardson*, 348 Ill. App. 3d at 801).

¶ 57 The defendant here contends that Trice's testimony regarding his grand jury identification of the defendant as the shooter constituted an improper introduction of inadmissible prior consistent statements that do not fall within either of the aforementioned exceptions. We agree.

¶ 58 The record below reveals that at trial, Trice testified that prior to identifying the defendant as the shooter, he initially lied to police about not knowing who the shooter was. Trice stated:

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"At first, I wasn't (*sic*) [telling the truth] because I was afraid what was going to happen." Trice admitted that he subsequently identified the defendant from a photo array. Trice further identified the defendant as the shooter at trial.

¶ 59 The record further reflects that on cross-examination, defense counsel sought to discredit Trice's identification of the defendant in several ways. First, defense counsel emphasized the fact that Trice continually lied to the police for almost a full day before identifying the defendant as the shooter. Second, defense counsel focused on Trice's motivation to lie, *i.e.*, his desire to "point the finger" at someone else and save his cousin, Matthews, who had also been arrested in connection with the shooting and who was a viable suspect because he had been beaten up by a group of rival Latin Kings two days before the shooting. Third, defense counsel sought to demonstrate that Trice's mother, and Matthews' aunt and guardian, Diane Trice, was going back and forth between Trice's and Matthews' interrogation rooms, suggesting that she acted as a conduit for Trice and Matthews to coordinate their identification of the shooter. Finally, defense counsel sought to establish that Trice initially gave the police a different version of events than what he later agreed to tell the grand jury. In that respect, counsel asked Trice: "And you told another story [to the grand jury] on that day?" and he responded, "No, ma'am."

¶ 60 The record reflects that in response to all of this probing by defense counsel into the credibility of Trice's identification, on redirect examination, the State introduced Trice's statements to the grand jury on June 3, 2009, where he testified as to what happened on May 16, 2009, and where he identified the defendant as the shooter. During this redirect examination, Trice explicitly acknowledged that his grand jury testimony was the same as his trial testimony.

¶ 61 Contrary to the State's assertion, although in cross-examining Trice, defense counsel attempted to imply that Trice had a motive to lie when he identified the defendant as the shooter, the State's introduction of Trice's grand jury statements affirming his identification of the defendant as the shooter, did not, as is required, predate any such motive to lie or fabricate so as to make those statements admissible at trial. There is no question here that Trice's motive to lie or fabricate his identification of the defendant to save Matthews and himself on the night of their arrest, would have predated his grand jury testimony on June 3, 2009. Therefore, the grand jury testimony would have been of little rehabilitative effect as those statements could not have disproved, explained, or qualified any inconsistency in Trice's later identification of the defendant as the shooter. As such, we are compelled to find that the trial court's admission of this evidence constituted an abuse of discretion. See *Johnson*, 2012 IL App (1st) 091730, ¶62 (holding that a written statement by a witness in which he identified the defendant as one of the shooters in a vehicle was inadmissible at the defendant's murder trial as a prior consistent statement, even though the State argued that defense counsel implied that the witness had recently fabricated his testimony because the witness and the defendant belonged to rival factions of the same gang; explaining that "[t]here [was] no question \*\*\* that the gang rivalry, as well as any motive to fabricate which might have arisen from that gang rivalry, preexisted the shooting itself," as well as the witness's written statement); see also *McWhite*, 399 Ill. App. 3d at 642 (holding that statements of a police officer in an arrest report for the defendant and at a preliminary hearing, describing the defendant as retrieving drugs from a "garbage can type" barbeque grill, were not admissible to rehabilitate the officer through prior consistent statements,

after defense counsel confronted the officer on cross-examination with a vice case report which was reviewed and signed by the officer and which made no mention of the barbeque grill; explaining that the preliminary hearing statement and arrest report did not pre-date the vice case report, nor any motive to lie or fabricate); *People v. Heard*, 187 Ill. 2d 36, 70 (1999) (holding that prior consistent statements of several defense witnesses were inadmissible where their motive to fabricate, namely their relationship with the defendant, existed at the time of the crime before they made any such statements); *People v. House*, 377 Ill. App. 3d 9, 19 (2007) (holding that a prior consistent statement of the defendant's brother was inadmissible where his motive to testify falsely, *i.e.*, his relationship with the defendant, predated the statement); *People v. Terry*, 312 Ill. App. 3d 984, 995 (2000) (holding that the trial court abused its discretion in admitting testimony about a witness's prior consistent statement where the witness did not make that statement until after his alleged motive to testify falsely arose).

¶ 62 Nevertheless even though we find error in the admission of the prior consistent statements, for the reasons that follow, we hold that review under the plain error doctrine is unnecessary as the evidence presented at the defendant's trial was far from closely balanced, but rather overwhelmingly established his guilt. In that respect, we reiterate that under the first prong of the plain error doctrine, pursuant to which the defendant here seeks review,<sup>5</sup> the burden is on

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<sup>5</sup>We note that the defendant here solely seeks review under the first prong of the plain error doctrine, contending that he was prejudiced by the introduction of Trice's prior consistent statements because the evidence was closely balanced and those statements bolstered the credibility of the only two witnesses (Trice and Matthews) who identified him as the shooter at

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the defendant to establish that "the evidence [presented at trial was] so closely balanced that the error alone threatened to tip the scales of justice against [him.]" *Piatkowski*, 225 Ill. 2d at 565 (citing *Herron*, 215 Ill.2d at 186-87).

¶ 63 Contrary to the defendant's assertion, the record below reveals that the evidence of his direct involvement in the crime was overwhelming. First, both Trice and Matthews consistently testified as to the defendant's actions on the date of the incident. Both testified that after Trice and Ward picked up Matthews, Brunt, Johnson and the defendant, they all proceeded to an alley near Coles Avenue where the Black P Stones used a "stash house" to store drugs and weapons. Both Matthews and Trice testified that the defendant left the car for a few moments before returning. Both further testified that after Trice drove the car out of the alley and to a stop sign on Brandon Avenue, they watched the defendant exit the vehicle and proceed to fire shots at a red vehicle parked next to 8311 South Brandon Avenue. Both testified that the car fired at by the defendant resembled a car that they had seen that evening and which was occupied by members of the rival Latin Kings gang, who had "flashed gang symbols at them." What is more, both Trice and Matthews positively identified the defendant as the shooter twice, first in a photo array at the police station and then subsequently at trial. This type of eyewitness testimony is sufficient to sustain a conviction so long as the witnesses viewed the accused under circumstances permitting a positive identification. See *People v. Keith C.*, 378 Ill. App. 3d 252, 258 (2007) ("A single witness's identification of the accused is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification") (citing *People v.*

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trial.

*Slim*, 127 Ill. 2d 3012, 306 (1989)).

¶ 64 What is more, Trice's and Matthews' identifications of the defendant as the shooter were corroborated by the testimony of at least four other witnesses and by forensic evidence compiled by the police. First, both Oritz and her son Cuevas, who lived in an apartment across from the scene of the crime, testified that they observed a man in a "dark hoodie" approach the victim's vehicle and shoot her. Ward too, testified that the individual in the "dark hoodie," who sat right behind him in the Ford Crown Victoria exited the car at Brandon Avenue and fired shots at the victim's vehicle. Both Trice and Matthews testified at trial that the defendant alone wore a "dark hoodie" on the night of the shooting, and that he sat right behind Ward in the Ford Crown Victoria. Although Ward could not identify the defendant as the shooter, he too acknowledged that among the six individuals in his car that night, only one wore a "dark hoodie." The testimony of two Chicago evidence technicians further corroborated the identification of the defendant as the shooter as it eliminated the remaining five individuals arrested in Trice's vehicle (including Trice, Brunt, Johnson, Matthews and Ward) as having fired a gun that night.

¶ 65 More importantly, the identification of the defendant as the shooter was further corroborated by the testimony of Aisha Jones, who averred that sometime after the shooting on May 16, 2009, she and Melvin Buffer, picked up the defendant near 81st Street and Coles Avenue, whereupon the defendant bragged to them that he "had just shot a [Latin] King in the face," and swore to God and the head of the Black P Stones gang that he was telling the truth. Jones also testified that on the following morning, the defendant continued to claim that he "shot a King in the face" and denied that the victim was, instead, a woman. Under this record, we find

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that the evidence of the defendant's guilt is far from closely balanced and rather overwhelmingly establishes his guilt. Accordingly, we cannot see how the introduction of Trice's brief statements at the grand jury hearing regarding the events of May 16, 2009, and his identification of the defendant as the shooter, could have prejudiced the outcome of his trial. Review under the first prong of the plain error doctrine is therefore inappropriate. *Piatkowski*, 225 Ill. 2d at 565 (citing *Herron*, 215 Ill. 2d at 186-87).

¶ 66 The defendant alternatively argues that if we hold that review is improper under the plain error doctrine, we nevertheless find that his defense counsel was ineffective for failing to object to the State's introduction of Trice's inadmissible statements to the grand jury. For the same reasons articulated above with respect to the overwhelming evidence of the defendant's guilt, we must decline.

¶ 67 In that respect, we note that to establish a claim of ineffective assistance of counsel, a defendant must demonstrate: (1) that his counsel's representation was deficient so as to fall below an objective standard of reasonableness and (2) that the deficient performance prejudiced him so as to deny him a fair trial. *Strickland v. Washington*, 466 U.S. 668 (1984). Both prongs of the *Strickland* test must be satisfied to establish an ineffective assistance of counsel claim. *People v. Albanese*, 104 Ill. 2d 504, 525-27 (1984). To demonstrate sufficient prejudice under the second prong of the *Strickland* standard, the defendant must show that there is a reasonable probability that the outcome of the trial would have been different or that the result of the proceeding was unreliable or fundamentally unfair. *People v. Evans*, 209 Ill. 2d 194, 220 (2004). Such a reasonable probability "is a probability sufficient to undermine confidence in the outcome."



*Strickland*, 466 U.S. at 694, 104 S. Ct. at 2068. In deciding whether a defendant has demonstrated deficient performance and the reasonable probability of a different result, a review court must "consider the totality of the evidence before the judge or jury." *Strickland*, 466 U.S. at 695, 104 S. Ct. at 2069. Where a defendant fails to satisfy *Strickland*'s second prong by failing to show prejudice, the reviewing court need not determine whether *Strickland*'s first prong of deficient performance has been met. *People v. Grant*, 372 Ill. App. 3d 772, 777 (2007).

¶ 68 In the present case, the defendant has failed to overcome the second prong of the *Strickland* analysis since he has failed to show how, absent the introduction of the fleeting prior consistent statements made by Trice at the grand jury hearing, the outcome of the trial would have been different. As already elaborated in detail above, the evidence of the defendant's direct involvement in the crime was overwhelming.

¶ 69 B. Improper Prosecutorial Remarks

¶ 70 The defendant next argues that he was denied a fair trial because the State improperly bolstered the credibility of one of their key witnesses, Aisha Jones, by making the following comment during its rebuttal closing argument:

"And Aisha Jones, Aisha has no reason to lie. In fact, all these people have no reason to lie when they come here and testify. They're no longer in custody. So why come in here and tell the same story \*\*\* Aisha Jones, yes, her brother was in custody, and because she knew that her brother didn't [*sic*] do it, of course she's going to come to the police. In addition, she also knew about who the real killer could be. *If she were going to lie, if she were concerned, oh gees, Diana Capers and my mom, they said this alibi, it's not*

*working, gees, what can I do. Wouldn't you make the lie better? A woman got shot.*

*Wouldn't you say, hey, you know what, I just shot a woman. I meant to kill a King, I just shot a woman, wouldn't that be much better? It would tie it together nice in a neat bow.*

And it would give the police such a strong statement of his." (Emphasis added.)

The defendant contends that these statements by the prosecutor exceeded the permissible bounds of commenting on a witness's credibility because they implied that if Jones had in fact been lying, she would have told a better lie. The defendant argues that these statements therefore inappropriately enhanced Jones' credibility for the jury.

¶ 71 The State initially asserts and the defendant concedes that he has failed to properly preserve this issue by not objecting to the prosecutor's comments during trial. See *Enoch*, 122 Ill. 2d at 186-87 (to preserve an issue for appeal, a defendant must first make an objection to the alleged error at trial, and then raise it in a posttrial motion). The defendant nevertheless seeks review of the issue under the first prong of the plain error doctrine.<sup>6</sup> As already note above, to succeed under this prong, the defendant has the burden of establishing that "a clear or obvious error occurred and the evidence [was] so closely balanced that the error alone threatened to tip the scales of justice against [him], regardless of the seriousness of the error." *Piatkowski*, 225 Ill. 2d at 565 (citing *Herron*, 215 Ill. 2d at 186-87).

¶ 72 We begin by addressing whether the prosecutor's comments were made in error. *Herron*,

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<sup>6</sup>The defendant again solely argues that review is proper under the first prong of the plain error doctrine, and does not contend that review is necessary under the second prong. We must therefore only address his claim with respect to the first prong.

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215 Ill. 2d at 187. It is well-settled that the State is given wide latitude in opening statements and closing argument, and that it may freely "comment on the evidence and draw all legitimate inferences deducible therefrom, even if they are unfavorable to the defendant." *People v. Pasch*, 152 Ill. 2d 133, 184 (1992); see also *People v. Hunter*, 331 Ill. App. 3d 1017, 1030 (2002), citing *People v. Crane*, 308 Ill. App. 3d 675, 687-88 (1999). While the State is permitted to comment on the credibility of State witnesses it must constrain itself to the facts in the record or inference fairly drawn from those facts, and it "may not enhance the credibility of the State witnesses." *People v. Lima*, 328 Ill. App. 3d 84, 98 (2002) (citing *People v. Montgomery*, 254 Ill. App. 3d 782, 794 (1993) and *People v. Ford*, 113 Ill. App. 3d 659 (1983)). The State's remarks will generally be found proper if they have been invited or provoked by the defendant. See *People v. Love*, 377 Ill. App. 3d 306, 313 (2007) ("[a] prosecutor's comments during rebuttal argument will not be deemed improper \*\*\* if they were invited by defense counsel's closing argument"). We review the circuit court's determination with respect to the propriety of closing arguments under an abuse of discretion standard. *Love*, 377 Ill. App. 3d at 313.

¶ 73 In the present case, a review of the prosecutor's comment in context of the entire record demonstrates that it was made in response to numerous comments made by defense counsel in closing argument in an attempt to discredit Jones by implying that she had a motive to lie, i.e., that she testified that she heard the defendant bragging that he had "shot a [Latin] King in his face," only after learning that her brother, James, had been arrested in connection with the shooting. In that vein, the record reflects the following comments made by defense counsel in closing argument:

"The State wants you to believe the story of Aisha Jones, sister of Jamie Jones. Aisha [Jones] took the stand and testified that she's surrounded by gangs. She's got family members that are gangs, her friends are gang members, her neighbors are gang members, she's heard phrases, she's seen signs thrown up, but she's not a gang member. Her brother is a gang member, but not her.

She knows that Jamie and [the defendant] are friends. \*\*\* And she knows all of Jamie's friends. \*\*\* They all live in the same neighborhood. They all go hang out together, a neighborhood where she's seen gang activity. \*\*\* She knows that they are all at the [police station.]

Aisha [Jones] [is] with Melvin Buffer all night, Melvin Buffer, the brother [of the defendant.] And when she gets up that next afternoon she finds out her mother is down at the police station because Jamie has been arrested for a murder.

\* \* \*

So she goes down to the police station. She goes down there to provide an alibi for her brother, and we get the barbecue. He's at the barbecue, at the tattoo barbecue. She's there for over nine hours. She testified. She had to tell them something. She had no choice. She had to get this off her brother.

What does she do? She gives them someone that they all know, someone that there won't be any problem in identifying. If we slip a picture in there of somebody that all of these individuals know, they can all point to the same person and my brother could go free.

Fabrication. Aisha Jones told you a story that she herself didn't even believe. She claims that [the defendant] \*\*\* got in a car and said, 'I shot a King in the face.' She didn't believe him. Did she call 911? Did she take any actions to say, wait a minute, a lady has been shot and the killer is sitting right next to me? Of course not, because she didn't believe—she told you, I didn't believe what he was saying.

\* \* \*

Aisha [Jones] doesn't know what happened. She knows that her brother is in custody and he's been there since the night before and she needs him to come home. Aisha [Jones] lied to the police to protect her brother; it was not until she talked to the police that her brother was released. Does she have a motive to lie? Of course she did and that's exactly what she did."

¶ 74 The defendant concedes that the State's rebuttal comments were made as a response to the aforementioned statements made by defense counsel in closing argument. He nevertheless argues that the State's response to those comments exceeded the scope of permissible prosecutorial conduct. The defendant points out that had the State constrained itself to arguing that Jones had no motive to lie because Jamie already had an alibi, its argument would have been an inference fairly drawn from the evidence at trial. The defendant points out, however, that the State went well beyond arguing that Jones had no motive to lie, and instead improperly enhanced her credibility by arguing that Jones was not lying because if she had been, she would have told a better lie—one that more directly implicated the defendant in Bazan's murder. After a review of the record and the comments made by the prosecutor in context of the entire closing arguments

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by both counsels, we are inclined to agree with the defendant that the scope of the prosecutor's rebuttal argument exceeded the bounds of proper comment as to witness credibility and that it was not based upon any facts or reasonable inferences in the record. This is particularly true in light of this court decision in *People v. Eichelberger*, 189 Ill. App. 3d 1020, 1033 (1989). In that case, we held that a prosecutor's comments in closing argument that if one of its witnesses was "going to make up a lie and \*\*\* try to convict somebody, he could have told [the State] a better story \*\*\* [a]nd, of course, if [the State] knew he was going to lie, [it] wouldn't even put him on" were inappropriate and exceeded the bounds of permissible prosecutorial comments as to a witness's credibility. *Eichelberger*, 189 Ill. App. 3d at 1033. Here, the prosecutor's comments mirror those we held to be erroneous in *Eichelberger*, since, as noted above, the State suggested that if Jones was lying, she could have told a much more compelling and detailed lie to try and get the defendant convicted. In addition, nothing in the record supports the prosecutor's inference that Jones could have and would have constructed a better lie. See *Lima*, 328 Ill. App. 3d at 98 (noting that in closing argument the prosecutor must constrain himself to the facts in the record and inferences fairly drawn from those facts).

¶ 75 However, we need not affirmatively determine whether the prosecutor's comments constituted error, since, regardless of the propriety of those comments, the defendant cannot establish the requisite prejudice under the first prong of the plain error doctrine under which he seeks review. See *Lima*, 328 Ill. App. 3d at 99 (noting that it was unnecessary to determine whether the prosecutor's rebuttal argument, which allegedly improperly enhanced the credibility of a key State witness was made in error, because the evidence of the defendant's guilt was

overwhelming, and the defendant could therefore not establish that review under plain error was required.) As already noted above, to establish prejudice, the defendant must show that the evidence presented against him at trial was "so closely balanced "that the prosecutorial comments" threatened to tip the scales of justice against him." *Piatkowski*, 225 Ill. 2d at 565 (citing *Herron*, 215 Ill.2d at 186-87). Since we have already concluded above that the evidence presented at the defendant's trial was far from closely balanced, but rather overwhelmingly established his guilt, we find that any error in the prosecutor's comments could and did not prejudice the outcome of the defendant's trial. Accordingly, review under the first prong of the plain error doctrine is inappropriate. *Piatkowski*, 225 Ill. 2d at 565 (citing *Herron*, 215 Ill. 2d at 186-87).

¶ 76

### III. CONCLUSION

¶ 77 For all of the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 78 Affirmed.

¶ 79 JUSTICE STERBA, specially concurring:

¶ 80 Although I concur in the result, I would not reach the issue of whether the prosecutor's closing rebuttal arguments constituted plain error, as I do not agree with the majority's conclusion that an error occurred.

¶ 81 The majority cites *People v. Eichelberger*, 189 Ill. App. 3d 1020, 1033 (1989), for the proposition that it is error for the State to make the argument in closing that if a witness was lying, a better lie could have been told. However, in *Eichelberger*, the State further argued that " 'of course, if [the State] knew [he was going to lie, it] wouldn't even put him on.' "

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*Eichelberger*, 189 Ill. App. 3d at 1033. Here, in contrast, while the State in rebuttal did suggest that Jones could have put forth a better lie if she was inclined to do so, the State did not go so far as to implicitly vouch for Jones's credibility as it did in *Eichelberger*.

¶ 82 More significantly, there is no indication that the State's closing arguments in *Eichelberger* were invited by the defendant's own arguments. Where, as here, a defendant attacks the credibility of witnesses in closing arguments, we have consistently allowed the State room to counter the attacks. See, e.g., *People v. Walsh*, 80 Ill. App. 3d 754, 765-66 (1980) ("where argument of defense counsel invites or provokes a response, defendant cannot complain that he was prejudiced by the response"); *People v. Figueroa*, 381 Ill. App. 3d 828, 850-51 (2008); *People v. Robinson*, 254 Ill. App. 3d 906, 919 (1993). For example, in *Robinson*, cited by the State, after the defendant insinuated during closing that the witnesses' testimony was part of a conspiracy to convict the defendant, the State in rebuttal gave a hypothetical description of how a "good frame-up" would have been conducted. *Id.* at 919. We held that these remarks were proper in light of the fact that they were made in direct response to the defendant's own arguments. *Id.*

¶ 83 Similarly, here, though there were no allegations of conspiracy, defendant repeatedly challenged Jones's credibility in closing by explicitly stating that she was lying to protect her brother. Thus, just as in *Robinson*, it was appropriate for the prosecutor to explain what a "good lie" would have been in an attempt to counter the attack on Jones's credibility. As such, I would hold that there was no error in the prosecutor's arguments and would not reach the issue of whether defendant can show plain error. Nevertheless, because the majority concludes that the



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evidence was not closely balanced so as to satisfy the first prong of plain error review and affirms defendant's conviction, I concur in the result.