

No. 14-2496

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST DISTRICT

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PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 10 CR 20640
	)	
ANDREW RUIZ,	)	
	)	Honorable Thomas J. Hennelly
Defendant-Appellant.	)	Judge Presiding

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JUSTICE SIMON delivered the judgment of the court.  
Presiding Justice Connors and Justice Harris concurred in the judgment.

**ORDER**

¶ 1 *Held:* The trial court did not err when it entered judgment on the jury's verdict finding defendant guilty of first degree murder and aggravated battery with a firearm following a drive-by shooting. None of defendant's claims amount to reversible error and, even if any evidentiary ruling was improper, it was harmless in light of the overwhelming nature of the evidence.

¶ 2 Defendant was found guilty of first degree murder and aggravated battery with a firearm for a drive-by shooting that took place on Halloween night in 2009. He appeals and asks us to reverse his convictions or, alternatively, that we vacate his convictions and remand the matter for further proceedings. Finding no reason to disturb the convictions rendered by the jury, we affirm.

¶ 3

### BACKGROUND

¶ 4 In the early morning hours following Halloween night 2009, a vehicle ran off the road and crashed into a light pole. It turned out that the vehicle was struck by a drive-by shooter before the crash. The individual in the passenger seat of the vehicle, Manuel Roman, was shot multiple times and, after remaining comatose for around a month, died from his injuries. The driver, Damian Nunez, was shot once in his neck and shoulder area. His injuries were minor and he was discharged from the hospital within hours. A rear passenger in the vehicle was unharmed.

¶ 5 While still at the hospital, Nunez was interviewed by Sergeant Ernest Cato of the Chicago police department. Nunez identified the shooter as a Hispanic male in his mid to late twenties with thick eyebrows, pudgy cheeks, a wide nose, a light mustache and a five o'clock shadow, wearing a hoodie. In the succeeding months, Cato's investigation led him to the Humboldt Park area where he received a tip from an informant that "Ari" might have relevant information about the shooting. Through a police database, Cato identified "Ari" as Arianna Rivera, and he located her for an interview.

¶ 6 During Cato's interview with Rivera, she purportedly identified defendant Andrew Ruiz as the shooter. Rivera also identified defendant's picture in a photo array. Rivera disclosed the identities of three other eyewitnesses, Krystal Garcia, Jasmine Santana, and Peter Portuguese. Rivera identified headshot photographs of those three individuals as well. Cato met with Peter Portuguese, but no information was produced regarding the content of that meeting.

¶ 7 Cato then met with Krystal Garcia. Garcia apparently told Cato that defendant was the shooter and identified his picture and the pictures of the other eyewitnesses. She told Cato that she also observed defendant give the weapon to Jorge Morrero after the shooting and she identified a

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photograph of him as well. Garcia gave a signed written statement memorializing her version of the events.

¶ 8 Cato also met with Jasmine Santana who implicated defendant as the shooter and identified photographs of him, Krystal Garcia, and Ariana Rivera. Santana gave a signed written statement memorializing her identifications. Defendant was arrested. Damian Nunez, Krystal Garcia, and Jasmine Santana all identified defendant as the shooter in a live lineup. Then, Arianna Rivera gave a written statement memorializing what she had told Cato months earlier in his investigation.

¶ 9 Defendant filed several pretrial motions. Defendant moved the court to exclude the lineup identifications. Defendant is a paraplegic so he sought to convince the court that the lineup was suggestive. However, the police officers went to a local hospital, borrowed wheelchairs, and put all of the other individuals in the lineup in wheelchairs too. The officers also covered all the subjects' legs so that there were no identifying characteristics viewable other than those from the waist up. The trial court denied defendant's motion to suppress. The defendant also moved to exclude testimony about gang membership on the basis that the State intended to use it as evidence of bad character. However, the trial court held that certain evidence of gang membership would be admissible for other purposes, such as to show motive.

¶ 10 The State, meanwhile, filed a motion to exclude evidence of a purported third party admission to the crime. Defendant was supposedly prepared to offer testimony from Mark Terry. Terry would have testified that one of his fellow gang members, Marco Cruz, confessed to the crime. Terry claims that he was driving in a car with Cruz two or three days after the shooting when Cruz stated: "On the Cobra. Don't say shit. I flamed up the dude." The language supposedly was understood by Terry to mean that Cruz shot the victim in this case. The trial court held that the

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statement was not admissible because it did not meet the criteria set forth by the United States Supreme Court for a reliable hearsay third party admission.

¶ 11 The case proceeded to a jury trial. At trial the State called Damian Nunez, the injured victim who was driving, to testify. Nunez identified defendant in open court as the one who shot him and his passenger. Nunez admitted that he only saw the shooter for less than five seconds and he did not see anything to indicate that the shooter was driving by using a method that would be necessary if the person was paralyzed.

¶ 12 The State called Krystal Garcia to testify. She testified that she and the other eyewitnesses, Arianna Rivera and Jasmine Santana, are members of the Maniac Latin Disciples street gang. On the night of Halloween, Garcia was hanging out with Rivera and Santana and that Santana called her cousin for a ride to a party that was set to begin after midnight. That cousin was defendant Andrew Ruiz. Santana knew that defendant was partially paralyzed, but testified that he could drive by using "sticks." She rode in the backseat with Rivera while defendant and his cousin Santana were in the front. Garcia testified that defendant told them that "it is Halloween and somebody is going to die tonight." When they pulled up to a red light, defendant pulled out a gun, but one of the girls told him not to shoot because she recognized the people in the vehicle as members of their same gang, just from a different neighborhood. Then, defendant drove a short distance forward and began shooting into another car. She testified that after the shooting, they drove to a location where defendant met Jorge Murrero, another member of their gang, and that defendant gave him the weapon. This testimony was consistent with her statement to Sergeant Cato and the statements given by Rivera and Santana.

¶ 13 The State also called Gilberto Portuguese who testified that on Halloween night in 2009, he

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and his brother were stopped at a red light when defendant pulled up beside him and flashed gang signs at him. He identified defendant in open court. Portuguese testified that defendant then drove a bit forward and began firing into a car in front of his. Portuguese saw and heard the gunshots. He did not see anything to indicate that the driver had a physical disability or was driving with an apparatus for a disabled driver. On cross-examination, Portuguese was confronted with the fact that he did not tell police or anyone that he could identify defendant as the shooter until days before trial. He had told the grand jury that he could not recognize the shooter because he was intoxicated at the time and because the shooter's face was obscured by a hooded sweatshirt. Portuguese testified at trial that he intentionally misled the police because he was in a gang which forbade him from cooperating with police and because he feared for his family's safety. By the time of trial, he claims to have cut ties with the gang and decided to cooperate because he had become religious.

¶ 14 Jasmine Santana testified that she was with Krystal Garcia and Arianna Rivera on Halloween and they were picked up by defendant. She denied that defendant is her cousin. She testified that she was high and drunk that night and could not remember where they were driving. She denied that she saw defendant shoot anyone. Santana did admit that she had implicated defendant as the shooter to Sergeant Cato in a written statement and before the grand jury. She denied the truth of the specific facts she had previously attested to. Santana testified that she made the statements implicating defendant as a result of being high, being coerced by police, and because she was afraid she would be accused of a crime if she refused to implicate defendant.

¶ 15 Santana initially refused to testify at trial so she was charged with contempt and a public defender, Carol Milder, was appointed to represent her. Because Santana then recanted at trial and her trial testimony was inconsistent with her grand jury testimony, the State called Milder to

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testify. The State questioned Milder about the circumstances of the contempt charges and a meeting she and Santana had with prosecutors where Santana reviewed the testimony she had given before the grand jury and did not refute any of the testimony at that time.

¶ 16 Arianna Rivera testified that she was with the other two females on Halloween 2009 and that they got a ride from Santana's cousin. She testified that she did not get a good look at the driver because he was wearing a hooded sweatshirt. She was in the backseat. Rivera testified that they drove around for several hours smoking marijuana because they were waiting to go to a party that did not begin until after midnight. At one point, the driver pulled up next to a car at a stop light and flashed a gang sign at that car's occupants, one of whom she recognized as Peter Portuguese. Rivera testified that they drove forward next to another car and she heard gunshots and ducked down immediately as their own car began speeding away. She testified that they were then dropped off at the party. Rivera stated that she never saw the driver of the car. Rivera also testified that she did not know if "Boo Boo" (defendant's alleged nickname), was the driver, she only assumed so because that was Santana's cousin. Rivera was impeached by various statements in which she had unequivocally identified the driver as Boo Boo.

¶ 17 Defendant called two alibi witnesses on his own behalf. Monica Ramos, defendant's sister-in-law, testified that she invited defendant and many other family members to her home for a party on Halloween in 2009. Defendant arrived at 7 p.m. Defendant's comings and goings are notable because he has to be carried up the stairs to the home. Defendant only left the party for 10 minutes sometime between 10:30 and 11:00 p.m. to go to the liquor store. The party went until after 4:00 a.m. and defendant was there the whole time. Maria Abonce, Monica Ramos's mother, also testified. She was at the Halloween party that her daughter threw in 2009. Abonce testified

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that defendant arrived at about 7:00 p.m. and only left for 15 minutes. She stayed at the party until 4 a.m. and defendant was still there when she left.

¶ 18 Defendant testified on his own behalf. Defendant testified that he is paralyzed from the waist down as a result of being shot in 2000. He could drive by using a hand control apparatus. Defendant testified that he went to his brother's house for Halloween in 2009. He arrived at the party at 7:00 p.m. and only left to run a brief errand with his brother. Otherwise, he remained at his brother's house, slept there, and did not leave until 11:00 a.m. when he woke up the next morning. Defendant denied shooting Manny Roman or even being with Santana, Rivera, and Garcia that night. He did testify that he knew those women, but not well.

¶ 19 The jury found defendant guilty of first degree murder and of aggravated battery with a firearm. The jury further found that defendant personally discharged a firearm during the commission of a crime that proximately caused someone's death. All told, defendant was sentenced to serve 90 years in prison. Defendant appeals his conviction on 10 separate grounds.

¶ 20 ANALYSIS

¶ 21 I. Ineffective Assistance of Counsel

¶ 22 Defendant argues that he was deprived of effective assistance of counsel because the State was permitted to call an attorney from the public defender's office while defendant himself was represented by the public defender's office. Defendant maintains that, because he was represented by the office that employs a prosecution witness, the duty of loyalty that an attorney owes his client was violated.

¶ 23 Defendant does not cite any controlling authority for the proposition that an attorney from the public defender's office cannot testify when the defendant is represented by another attorney

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from the same office. Instead, he relies on general propositions about the duty of loyalty and suggests that there is a *per se* prohibition of an assistant public defender testifying against a defendant when the defendant is represented by an assistant public defender from the same office. However, Carol Milder, the assistant public defender who testified, represented a different prosecution witness, not defendant. She was not involved in defendant's representation in any way. She did not offer any substantive evidence against defendant. Instead, Milder was called to impeach the testimony of Jasmine Santana who recanted her previous sworn statements at trial.

¶ 24 Our Supreme Court has previously recognized that the public defender's office must be treated differently than an office of private defense attorneys for purposes of conflicts of interest. *People v. Banks*, 121 Ill. 2d 36, 41 (1987). So even if one member of the public defender's office would have a conflict, it does not mean that the entire office is conflicted out. *People v. Miller*, 79 Ill. 2d 454, 461 (1980). In fact, it is not uncommon for two public defenders to represent two different defendants who have inconsistent defenses where they are essentially adversarial. See *id.* Under the circumstances here, we see no reason that defendant's counsel would be unable to subordinate office allegiances to the foremost obligation owed to his client. See *In re Tamera W.*, 2012 IL App (2d) 111131, ¶ 39.

¶ 25 Being that there is no *per se* conflict requiring disqualification, defendant's specific arguments highlight the reason he cannot succeed on an ineffective assistance claim. Where no *per se* conflict exists, the defendant must show the existence of an actual conflict and actual prejudice resulting from the appointed attorney's representation. *Id.* at ¶ 39; see also *Banks*, 121 Ill. 2d at 42 (a case-by-case examination is necessary to determine whether any facts peculiar to the case preclude the representation of the individuals whose interests were allegedly in conflict). Here,



whether the declaration was made spontaneously, to a close acquaintance, shortly after the crime occurred; (2) whether it was corroborated by other evidence; (3) whether it was self-incriminating and against the declarant's penal interest; and (4) whether there was an adequate opportunity for the State to cross-examine the declarant. *People v. Warren*, 2016 IL App (1st) 090884-C, ¶ 95. The presence or absence of any one factor is not determinative; rather, the trial court should consider whether the statements were made under circumstances demonstrating their trustworthiness. *Id.* Both parties, correctly, submit that we are to review the trial court's refusal to admit a statement against penal interest for an abuse of discretion. See *People v. Bowel*, 111 Ill. 2d 58, 68 (1986).

¶ 29 The trial court went through each factor set forth in *Chambers* and found that defendant failed to persuade the court on any single point. Of course, the inquiry is based upon an assessment of the totality of the circumstances and whether, in light of all relevant considerations, any reasonable trial judge, in his discretion, could find that the statement does not bear persuasive assurances of trustworthiness. See *id.* Again, the statement at issue is: "On the cobra, don't say shit, I flamed up the dude."

¶ 30 The trial court explained that it found the proffered statement to be too vague and ambiguous to be reliable. The statement was not, in the trial court's judgment, "real clear and concrete" about what Cruz actually meant. There was no indication when Cruz was admitting to have "flamed up the dude" or who specifically he was referring to, nor was there enough other information to deem the statement to implicate Cruz in a specific crime. See *People v. Eyman*, 222 Ill. App. 3d 1097, 1104 (1991) (vague statement made by one gang member to another did not specifically incriminate the declarant in the subject crime because there was not a sufficient showing that the statement was clearly against the declarant's interest). In fact, the record appears

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to demonstrate that Terry himself did not know that the statement may have been in reference to Roman being shot until he found out a week later that the father of his cousin's children (Roman) had been shot in the same area.

¶ 31 The trial court also explained its finding that Cruz and Terry were not "close" acquaintances under *Chambers*. The only indicia of closeness offered by defendant was that they were in the same gang. Although defendant relies on cases where common gang membership has been found to satisfy the close acquaintance standard, there is no rule that common gang membership *alone* is sufficient as a matter of law. Compare *People v. Wilcox*, 407 Ill. App. 3d 151, 168 (2010) (common gang membership along with knowing each other well enough that one member knows the other's whereabouts was sufficient to show close acquaintanceship) with *U.S. ex rel. Crivens v. Washington*, No. 94 C 1973, 1998 WL 67609, at \*3 (N.D. Ill. Feb. 11, 1998) (being in related, allied gangs with mutual acquaintances insufficient to provide the requisite assurances of trustworthiness). All of the persuasive authority that examines and finds the close acquaintance factor to weigh in favor of admissibility contains additional information about an actual personal relationship.

¶ 32 Here, generally, nothing was offered to show how many members the gang has or how much time gang members spend together, nor was there any evidence offered regarding how much personal information they share with one another. There was certainly no evidence regarding the closeness of Terry and Cruz specifically. Cruz and Terry had only known each other for, at most, mere weeks. The statement was apparently made in the first couple days of November 2009 and Terry was in a different gang until sometime in October 2009. There is no evidence to demonstrate when they even met. For all we know, this was the first time they ever spoke. Based on the record,

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we cannot make a determination that they had a developed relationship; or if they were anything more than casual acquaintances, if even that. See *People v. Swaggirt*, 282 Ill. App. 3d 692, 701 (1996). ("Spontaneous admissions to a close acquaintance are apt to be more trustworthy than admissions made to strangers or casual acquaintances.").

¶ 33 Addressing the corroboration factor, defendant points to the context of the statement—that it was prefaced by implying that the event was near a gas station and that the statement was made while Cruz and Terry were driving at the intersection of North Avenue and Grand Avenue. The trial court pointed out that the statement does not have any details about the nature of the crime, observing that the statement does not address "how many victims there were, the sex, the age, the nature of the crime, the instrumentality of the crime, location, wounds, none of that." Indeed, "*the guy* that had been shot by the gas station" was actually two people. And there were three people in the car. There is no indication that the statement refers to a drive-by shooting or anything identifiable to tie the statement to this case.

¶ 34 The testimony and pretrial statements and identifications from Portuguese, Rivera, Santana, and Garcia also cut hard against finding any corroboration. They all testified consistently that defendant was the shooter and identified defendant as the perpetrator repeatedly in photo arrays, in a lineup, and at trial. Portuguese's identification came with significant additional corroboration from Santana, Garcia, and Rivera who testified that they were in the car and that defendant was the shooter. Terry's proffered testimony really had no meaningful corroboration.

¶ 35 The parties make somewhat circular arguments concerning whether Cruz was available to testify or be cross-examined. There is some indication that Cruz would have testified that he never made the statements and that he would have presented witnesses to testify about his whereabouts at

the time of the shooting. Defendant never presented Cruz or presented any evidence that it tried to subpoena him before the trial court ruled that Terry would not be allowed to testify. Defendant refers to statements Terry gave to detectives and what his testimony might have been, but there is really an insufficient offer of proof in the record on appeal from which we could find the statement to be admissible—certainly not enough to find that the trial court abused its discretion in ruling on this issue. None of the trial court's individual findings constitute an abuse of discretion nor does its ultimate ruling that the uncorroborated hearsay statement should be excluded.

¶ 36 III. Admissibility of Prior Consistent Statement

¶ 37 Defendant argues that the trial court erred when it allowed the State to question Arianna Rivera about her grand jury testimony and her handwritten statement. Defendant contends that Rivera's testimony at trial was not materially inconsistent with her prior testimony. This argument is forfeited because defendant did not include it a posttrial motion. *People v. Piatkowski*, 225 Ill. 2d 551, 564 (2007). In addition, defendant's record cite for the proposition that it properly objected at trial is simply that it is in volume 3 or 4 of the report of proceedings, which is improper.

¶ 38 Defendant asks us to review the forfeited errors under the plain error doctrine. Defendant also asks us to review the forfeited errors on the basis that he was denied effective assistance of counsel as a result of his counsel's failure to preserve the errors for review. Under plain error review, we will grant relief to a defendant in either of two circumstances: (1) if the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, or (2) if the 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. Herron*, 215 Ill. 2d 167, 178-79 (2005). To be entitled to relief for ineffective assistance of counsel, a defendant

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must show that his counsel's representation fell below an objective standard of reasonableness and that he suffered prejudice as a result. *People v. Scott*, 2015 IL App (1st) 131503, ¶ 27.

¶ 39 Defendant claims that he is entitled to a reversal of his conviction under plain error review or for ineffective assistance of counsel on the basis that the evidence of his guilt was closely balanced and because he was prejudiced by the admission of the evidence. Under the closely-balanced prong of plain error review, the defendant must show prejudicial error. *Id.* The defendant bears the burden of persuasion with respect to prejudice. *People v. Lewis*, 2015 IL App (1st) 130171, ¶ 31. Similarly, to satisfy the prejudice prong of an ineffective assistance of counsel claim, the defendant must show that, but for counsel's deficient performance, a reasonable probability exists that the result of the proceeding would have been different. *People v. Hensley*, 2014 IL App (1st) 120802, ¶ 45.

¶ 40 The uncontradicted evidence against defendant is strong and leaves defendant unable to show prejudice so as to entitle him to plain error relief or relief for ineffective assistance of counsel. As is explained in more detail below, contrary to being closely balanced, the evidence against defendant was overwhelming. See *infra* section X.

¶ 41 IV. Introduction of Gang Affiliation Evidence

¶ 42 Defendant argues that the court erred when it allowed the state to introduce evidence that he was a gang member. Under Illinois law evidence that defendant is a gang member is only admissible where there is sufficient proof that such membership or activity is related to the crime charged. *People v. Smith*, 141 Ill. 2d 40, 58 (1990). Evidence indicating that the defendant was a member of a gang or was involved in gang-related activity is admissible to show common purpose or design, or to provide a motive for an otherwise inexplicable act. *Id.* The parties both submit that

admitting evidence of a defendant's gang membership is reviewed for an abuse of discretion. See *People v. Roman*, 2013 IL App (1st) 110882, ¶ 23.

¶ 43 In response to a pretrial motion, the trial court ruled that it would only allow evidence of gang membership insofar as it related to motive. Defendant, however, maintains that there was no evidence presented to support a finding that the shooting was gang-motivated. The State's theory of the case, supported by abundant evidence, was that this case had a profound amount to do with gang membership.

¶ 44 On the night of the shooting, defendant was in a car with three admitted fellow gang members, Santana, Garcia, and Rivera. The State presented evidence that defendant pulled up next to the Portuguese brothers and flashed a gang sign. Defendant did not shoot at them because the girls in his car recognized the Portuguese brothers as fellow members of the same gang. Then, there was evidence that defendant pulled up to car occupied by Roman and Nunez, flashed a gang sign again, and then opened fire. There was also evidence that, after the shooting, defendant dropped off the gun to another fellow gang member, Jorge Morrero, back in their gang territory. All of this gang evidence was relevant and admissible to paint a picture of the events that transpired and to provide an explanation for why defendant did what he did. The trial court did not abuse its discretion in allowing references to defendant's gang involvement.

¶ 45 V. Admission of Evidence about Jorge Morrero

¶ 46 Defendant argues that the trial court erred when it allowed the State to introduce evidence that defendant associated with Morrero, that Morrero was a gang member, that Morrero was incarcerated during the course of the investigation, and that Morrero died prior to trial. Defendant maintains that this was an effort by the State to imply guilt by association.

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¶ 47 It is improper for the State to convey to the jury that a defendant is guilty by association. *People v. Mapp*, 283 Ill. App. 3d 979, 991 (1996). But in this case, all of the evidence concerning Jorge Morrero was relevant and admissible. The evidence was an essential part of the narrative in the case and was not unduly prejudicial.

¶ 48 Jorge Morrero was made a part of the case based on the testimony of the witnesses who were with defendant at the time of the shooting. Their interviews revealed that, after the shooting, defendant went and met with his fellow gang member to dispose of the weapon. The State was not required to omit that part of the narrative when it was necessary to help the jury understand what happened. The State offered the evidence about Morrero to explain why no gun was recovered. Evidence that a defendant disposed of a weapon is admissible and is indicative of consciousness of guilt. *People v. Price*, 158 Ill. App. 3d 921, 927 (1987).

¶ 49 The evidence concerning Morrero being in prison when he was interviewed by detectives is similarly not unfairly prejudicial. The testimony of Detective Cato was merely a passing reference to the course of his investigation. The State never attempted to imply that the jury should find defendant guilty based on any association with Morrero. The evidence was not used as a means to show bad character and was admissible for other purposes. Moreover, the evidence was necessary to explain why Morrero was not called to testify. The evidence was relevant and there was no danger of unfair prejudice. Ill. R. Evid. 403. The trial court did not abuse its discretion by allowing testimony about Jorge Morrero.

¶ 50 VI. Alibi Witnesses Gang Connections

¶ 51 Defendant argues that the trial court erred when it allowed the State to elicit testimony that his alibi witnesses were related to a gang member, defendant's brother. This issue is forfeited.

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Nonetheless, the testimony was brief and it was relevant to show potential bias or motivation for the witnesses giving certain testimony. See *People v. Herron*, 2012 IL App (1st) 090663, ¶ 20 (“Bias of a witness, whether favorable or adverse to the defendant, is always pertinent to the question of the witness' credibility.”). The testimony was probative on the issue of why the witnesses might have provided an alibi for defendant, and the jury was entitled to hear that evidence to make an assessment of the veracity of their testimony. Even more, the witnesses actually testified that defendant's brother had not been active in a gang for many years, or that they did not know whether he was a gang member. So the testimony was not even necessarily unfavorable. Admitting evidence that defendant's brother might have been in a gang was not error, but even if it was it would not entitle defendant to plain error relief because the evidence was not unduly prejudicial and it did not deny defendant the right to a fair trial.

¶ 52 VII. Admission of Ancillary Evidence about Gangs

¶ 53 Defendant argues that the trial court erred when it allowed the State to introduce evidence about gangs such as their rivalries, structure, and rules. Defendant maintains that this evidence was beyond the scope of motive, which the trial court indicated was the only basis on which it would allow evidence about gang connections in the first place.

¶ 54 However, the evidence about gang territory was relevant as it related to a possible motivation for the shooting. The evidence was offered to explain the events that occurred such as defendant not recognizing the Portuguese brothers as members of his own gang because they were affiliated with a different sect of the same organization. The State's introduction of evidence of defendant traveling back to his gang's territory to dispose of the weapon was similarly used to explain the circumstances of the crime, not to prejudice defendant as a gang member in the eyes of

the jury. The testimony that the area contained a number of active, rival gangs was admissible for showing why a purported gang member might want to shoot someone unaffiliated with his gang.

¶ 55 Similarly, the revelation that Santana, Rivera, and Garcia were members of the same gang did not unfairly prejudice defendant. Their involvement in the gang was necessary for the jury to adequately assess their credibility for a number of reasons. *People v. Herron*, 2012 IL App (1st) 090663, ¶ 20. The evidence was also offered as a reason for why the witnesses had potentially given varying accounts of the events to investigators at different points. The jury was entitled to have that information to decide whether to believe the witnesses' testimony at trial. For the same reasons given in sections IV, V, and VI *supra*, and based on the overwhelming nature of the evidence against defendant as described in section X *infra*, the admission of ancillary gang evidence against defendant does not warrant reversal.

¶ 56 VIII. Evidence that the Victims were Not Gang Members

¶ 57 Defendant argues that the trial court erred when it allowed the State to elicit testimony that the victims of the shooting were not affiliated with gangs. Defendant contends that the evidence had the effect of inflaming the passions of the jury by engendering sympathy for the victims. This argument is forfeited because defendant did not include it a posttrial motion. *Piatkowski*, 225 Ill. 2d at 564. Defendant claims that he is entitled to a reversal of his conviction under plain error review or for ineffective assistance of counsel on the basis that the evidence of his guilt was closely balanced and because he was prejudiced by the admission of the evidence.

¶ 58 The testimony regarding the witness's non-affiliation with a gang was brief. Damian Nunez testified that he attempted to avoid making eye contact with defendant because he had grown up in a gang-infested area and thought that not interacting with defendant would help him avoid a

confrontation. It was evidence that explained the victim's state of mind at the time of the shooting. There is no indication that the State attempted to use the lack of gang affiliation to promote sympathy for the victims or to prejudice defendant. The testimony also explained why his identification of defendant and defendant's vehicle was subject to impeachment. Nunez testified that he only observed defendant for mere seconds. There were several permissible bases for the admission of the evidence and, therefore, its admission is not reversible error. *People v. Chavez*, 327 Ill. App. 3d 18, 29-30 (2001). Moreover, the uncontradicted evidence against defendant is strong and leaves defendant unable to show prejudice so as to entitle him to plain error relief or relief for ineffective assistance of counsel. As is explained in more detail below, contrary to being closely balanced, the evidence against defendant was overwhelming. See *infra* section X.

¶ 59 IX. Gilberto Portuguese's Religious Conversion

¶ 60 Defendant argues that the trial court committed reversible error when it allowed the State to introduce evidence that one of its witnesses, Gilberto Portuguese, recently became religious. Defendant maintains that the State used Portuguese's faith to bolster his credibility at trial and to demonstrate that his earlier, contradictory accounts were less credible by virtue of his newfound religious beliefs.

¶ 61 The Illinois Rules of Evidence state that "[e]vidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced." Ill. R. Evid. 610. But the testimony about Portuguese's religion was not admitted for the purpose of showing that the jury should find him credible. Instead, his religious conversion was relevant to show why he refused to cooperate with police until the eve of trial. In fact, defendant opened the door to that testimony when, on

cross-examination, he repeatedly questioned why Portuguese gave conflicting accounts of the relevant events during the course of the investigation, before the grand jury, and then at trial. The testimony was not introduced for purpose of showing him to be pious or to bolster the perceived veracity of his testimony. The State never intimated to the jury that Portuguese should be believed on the basis of his religious beliefs. And, as addressed in section X *infra*, any error would be harmless where the testimony was brief and the totality of the evidence against defendant is overwhelming.

¶ 62 X. The Sufficiency of the Evidence

¶ 63 Defendant argues that the evidence against him was insufficient for a jury to find him guilty and, thus, the judgment is against the manifest weight of the evidence, entitling him to reversal. However, far from the position staked out by defendant, our assessment is that the abundance of evidence against him is not only sufficient to sustain the convictions, it is overwhelming.

¶ 64 The standard of review on a challenge to the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Ross*, 229 Ill. 2d 255, 272 (2008). It is not the reviewing court's function to retry the defendant. *People v. Betance-Lopez*, 2015 IL App (2d) 130521, ¶ 40. The trier of fact assesses the credibility of the witnesses, determines the appropriate weight of the testimony, and resolves conflicts and inconsistencies in the evidence. *People v. Johnson*, 2015 IL App (1st) 123249, ¶ 21.

¶ 65 Defendant maintains that "if not for the admission of improper evidence, the jury might have" acquitted him. Defendant points out that there was no physical evidence and that he

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presented plausible concerns about the State's witnesses' credibility, motivation for testifying, and their ability to observe the shooter. Concerns, such as that: the females who claim to have been with defendant admit that they were high, that they might have been motivated by the \$10,000 reward, and that they had been threatened with charges of perjury or contempt if they did not cooperate. Defendant had the opportunity to, and in some cases did, present these alleged concerns to the jury. None of those factors render any of the evidence inadmissible, nor do they actually contradict any of the evidence against defendant.

¶ 66 No one contests that there was a drive-by shooting on Halloween night 2009 that killed Manuel Roman and injured Damian Nunez. The only question in the case was whether defendant was the perpetrator. Five separate eyewitnesses with different motivations, interests, and allegiances all provided testimony that defendant was the shooter. All told, throughout the investigation and trial, there were more than a dozen positive identifications of defendant as the shooter. Three of the eyewitnesses, Garcia, Rivera, and Santana, were in the vehicle with defendant and testified that they were members of the same gang. It is true that, at trial, Santana recanted the statement she gave to police during the investigation, but the others did not. Santana's recantation did little to diminish the strong confluence of evidence coming from the passengers in the car and the outside eyewitnesses. The testimony from Garcia, Rivera, and Santana matched the testimony from Portuguese, who was a bystander, and the testimony of Nunez, who was a victim, on details that would not be known by someone unless the person was present. The fact that their testimony squares on minor or even obscure details defies coincidence.

¶ 67 Defendant maintains that Portuguese and Nunez both admittedly had only a brief opportunity to observe the shooter. That alleged flaw in their identification testimony was also

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presented to the jury. Nunez and Portuguese's identification testimony, however, is not free-standing and must be accorded the requisite weight in light of how it ties in with all of the State's other evidence. The testimony from such a diverse group of witnesses was remarkably consistent and was not contradicted in any meaningful way. The evidence was further corroborated by, among other things, Chicago police POD cameras that showed defendant's vehicle fleeing the area shortly after the time of the shooting. While defendant offers several reasons that he believes that the evidence was closely balanced, it was not. The trial court committed no reversible error and the jury's verdict must stand.

¶ 68

#### CONCLUSION

¶ 69 Accordingly, we affirm.

¶ 70 Affirmed.