2013 IL App (2d) 120508-U
No. 2-12-0508
Order filed May 29, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of McHenry County.
Plaintiff-Appellee,	)	
v.	)	No. 01-CF-363
KENNETH E. SMITH,	)	Honorable Sharon L. Prather,
Defendant-Appellant.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Justices Zenoff and Spence concurred in the judgment.

ORDER

¶ 1 *Held*: The evidence was sufficient to sustain defendant's conviction of first-degree murder and attempt armed robbery. The court's evidentiary rulings did not deprive defendant of a fair trial. Affirmed.

¶ 2 Following a *third* jury trial, defendant, Kenneth Smith, was convicted of two counts of first-degree murder (720 ILCS 5/9-1(a)(2), (3) (West 2002)) and one count of attempt armed robbery (720 ILCS 5/8-4(a), 18- 2(a)(2) (West 2002)). After the court merged the murder convictions, defendant was sentenced to 67 years' imprisonment for first-degree murder (including a 25-year add-on for discharging the firearm (730 ILCS 5/5-8-1(d)(3) (West 2002))) and a concurrent 7 years'

imprisonment for attempt armed robbery. Defendant appeals, arguing that: (1) the evidence was insufficient to sustain his convictions; and (2) numerous evidentiary rulings constituted an abuse of discretion and violated his due process rights. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On March 6, 2001, two masked men attempted to rob the Burrito Express restaurant in McHenry and one of them shot and killed its owner, Raul Briseno. In May 2001, defendant (age 25), Justin Houghtaling (19), Jennifer McMullan (19 and defendant's girlfriend), and David Collett (18) were arrested for the incident. On May 12, 2001, Houghtaling was arrested in Omaha, Nebraska, and gave a statement to police, implicating himself and defendant. The State indicted defendant on May 31, 2001, based on Houghtaling's statement. Houghtaling pleaded guilty on November 14, 2001, and was sentenced to 20 years' imprisonment in exchange for his testimony against the others. Collett also pleaded guilty. Following a trial that included Houghtaling's testimony, McMullan was convicted of first-degree murder and attempt armed robbery; she was sentenced to 27 years' imprisonment.

¶ 5 Defendant's first trial occurred in 2003. There, the State called Houghtaling, who refused to testify, invoking his fifth amendment right against self-incrimination (U.S. Const., amend. V; Ill. Const. 1970, art. I, §10). The trial court declared Houghtaling unavailable and allowed the State to present Houghtaling's testimony from McMullan's trial (implicating himself and defendant in the crimes). Defendant was convicted of attempt armed robbery and first-degree murder (and was also found to have personally discharged the firearm that proximately caused Briseno's death); he was sentenced to concurrent terms of 67 and 12 years' imprisonment. However, on appeal, this court reversed and remanded for a new trial, holding that, under the subsequently issued opinion in

Crawford v. Washington, 541 U.S. 36, 53, 54 (2004)[1], Houghtaling's prior statements were testimonial, were admitted in violation of defendant's right to confront witnesses, and that the error was not harmless because the testimony was the only direct evidence linking defendant to the shooting. This court remanded for a new trial after concluding that the remaining evidence, absent the erroneously admitted statements, was sufficient to prove defendant guilty beyond a reasonable doubt. *People v. Smith*, No. 2-03-1076 (2005) (unpublished order under Supreme Court Rule 23).

¶ 6 Defendant's second trial occurred in 2008. There, the State again called Houghtaling. On direct examination, Houghtaling testified that he and defendant robbed the Burrito Express. Specifically, at 7:20 p.m., on March 6, 2001, while wearing masks, they went to the restaurant and, with defendant holding a pistol, announced a robbery. Briseno then picked up a knife and chased Houghtaling and defendant outside. Houghtaling slipped on ice and the other man working with Briseno, Eduardo Pardo, grabbed him. Someone pulled up Houghtaling's ski mask. Briseno and Pardo wrestled with Houghtaling until defendant walked back, fired shots, and Briseno jerked and let go of Houghtaling. When Pardo let go, Houghtaling ran to McMullan's waiting car. Collett was in the rear of the car. Defendant told Houghtaling that he did what he had to do. The group then drove to a nearby house, where defendant's friend, James Weisenberger, resided, and they drank through the night and remained until the next morning. Houghtaling testified that he wore a green jacket on the night of the murder and that police later took the jacket. Houghtaling further testified

[1]Holding that a testimonial statement, including testimony at a former trial, of a witness absent from trial may be admitted only if the witness is unavailable and if the defendant has had a prior opportunity to cross-examine the witness. *Id.*

that, in exchange for his testimony against defendant, he agreed to a plea deal with the State of 20 years' imprisonment (he faced a possible sentence of 20 to 60 years).

¶ 7 On cross-examination at the second trial, however, Houghtaling recanted, stating that the testimony he had just given was not true and that he was being forced to lie because the State wanted to convict defendant. He testified that he had been with defendant, Collett, and McMullen that night and that the group had observed the police activity down the road, but were unaware of the shooting. On re-direct examination, the State impeached Houghtaling with statements he made to police in Omaha, Nebraska, in May 2001.

¶ 8 The defense's theory at the 2008 trial was that another group (not connected to defendant) committed the crime. This group, known as the DeCicco group, was linked to a gun—the Brummett gun—recovered in the case. The defense argued that Russell (Rusty) Levand killed Briseno. Defendant called Susanne Dallas DeCicco (Levand's one-time girlfriend) and Adam Hiland (age 15 and DeCicco's cousin), who each denied their involvement in the shooting. Defendant then sought to introduce their prior confessions, but the trial court barred the evidence of Hiland's confessions. Defendant was convicted of murder and attempt armed robbery and was sentenced to 67 years' imprisonment for murder and a concurrent term of 7 years' imprisonment for the attempt armed robbery conviction. On appeal, this court reversed and remanded for a new trial, holding that the trial court erred in: (1) not allowing the defense to impeach its own witness (Hiland) with a prior inconsistent statement because that witness's testimony affirmatively damaged defendant's case; and (2) admitting certain character evidence. This court also determined that the evidence was sufficient

to allow a retrial without a double jeopardy bar. *People v. Smith*, No. 2-08-1106 (2010) (unpublished order under Supreme Court Rule 23).[2]

¶ 9 At the third trial in 2012, which is the subject of this appeal, the State's theory was that defendant (carrying a .22-caliber handgun) and Houghtaling entered the Burrito Express, wearing ski masks and with the intention of robbing it. During the attempted robbery, Briseno pulled a knife and, along with his employee, Pardo, chased the two masked men out of the restaurant. Pardo caught Houghtaling after he slipped on a patch of ice and dragged him toward the restaurant. Defendant then started shooting, ultimately hitting Briseno, who died. Defendant and Houghtaling fled. Collett waited outside, and McMullen drove the getaway car.

¶ 10 The defense theory was, again, that defendant was not involved in the crimes and that the DeCicco group was involved.

¶ 11 A. Pretrial Proceedings

¶ 12 Prior to trial, defendant sought leave to admit evidence, specifically, Patrick Anderson's testimony, showing that Briseno sold cocaine from the Burrito Express and that Levand knew of Briseno's drug-dealing, giving Levand a motive to rob the restaurant.

¶ 13 Initially, defense counsel submitted a December 29, 2011, letter Anderson wrote to defense counsel while Anderson was incarcerated. He stated that, close to the time Briseno was shot, he and Levand went to the Burrito Express to purchase cocaine. Levand knew Briseno was the source of the cocaine Anderson sold, and Anderson had told him that, "at times," Briseno kept large amounts of money and cocaine at the restaurant. Anderson also stated that he had become friends with

[2]Subsequently, Houghtaling was convicted of perjury based on his testimony at defendant's second trial.

Briseno through a man named "Serge," who was a cook at one of Briseno's restaurants. Anderson would buy cocaine from Serge and Briseno, and he sold it in the McHenry area, including to DeCicco and Levand. Anderson further stated that, after the shooting, he had heard rumors that the DeCicco group committed the crime. In June or July 2011, while incarcerated in the McHenry County jail, he again met Levand, who confessed to him about the shooting after Anderson told him that he believed Levand had a motive to commit the crime since Anderson had told him that Briseno was his source. Finally, Anderson stated that he was coming forward with this information because he had once been wrongly accused and wished that someone had come forward to help him.

¶ 14 The State offered to stipulate that Anderson would testify in accordance with his letter. Following some discussion as to whether Anderson should be brought into court for a formal offer of proof, the trial court then inquired how defense counsel would overcome hearsay issues raised by the contents of the letter. Defense counsel argued to the court that Anderson's statements to Levand and Levand's statements to Anderson were offered to show Levand's knowledge of Briseno's drug-dealing and not for the truth of any matters asserted. Defense counsel also argued that the letter was being offered to show what Levand did as a result of receiving that information and that this tended to show that defendant did not commit the crime and that somebody else did. The State argued that the evidence, including that of two other witnesses that defense counsel had sought to introduce, was "collateral" and "confusing" and did not relate to any alleged motive.[3]

[3]Defendant also sought to introduce testimony from Guilermo Quinones, an undercover operative with the Metropolitan Enforcement Group in Lake County, and Richard Solarz, a detective sergeant. Quinones would have testified that, less than six months before the shooting, he met Briseno and, on one occasion, spoke to him about his cocaine business and Briseno offered to sell

¶ 15 The court initially noted that, at defendant's second trial, it had excluded the testimony of the other two individuals and that the only new evidence at the third trial was Anderson's letter. The trial court excluded Anderson's testimony, finding that the letter Anderson wrote "contains numerous hearsay statements that would be inadmissible." Further, it was "highly suspect" because Anderson came forward "ten years after the fact." The court further found that the letter did not establish a motive for the DeCicco group to commit a robbery and that there was "no close connection to the drugs and to this crime for which the defendant is on trial."

¶ 16 Defense counsel then requested the opportunity to make a live offer of proof, which the trial court granted. Anderson took the stand and testified that he is currently incarcerated for possession of a handgun by a felon and delivery of a controlled substance. He also has convictions for domestic battery, retail theft, and possession of a controlled substance. In 2001, he knew Briseno well and purchased cocaine from him (at least 20 times) through a man named Serge, who worked in one of Briseno's restaurants. Anderson stated that he never directly purchased cocaine from Briseno, but understood that the drugs Serge sold to him came from Briseno.[4] About one week before the March

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him cocaine, which he subsequently did. Solarz would have testified that he conducted a search of the Burrito Express on March 7, 2001, with a K-9 handler and narcotics-sniffing dog. During the search, the dog indicated the possible detection of narcotics inside the restaurant. The trial court excluded this testimony.

[4]Anderson explained that, at times, he and Serge would have to wait at the Burrito Express for Briseno to arrive, after which, Serge would run in and return with drugs. At other times, when Anderson believed he was charged an unfair price, he would speak to Briseno, who would tell him to speak to Serge and the price would be reduced.

2001 shooting, Levand (a friend Anderson knew from his school days) accompanied Anderson (in DeCicco's car) to the Burrito Express to purchase drugs from Serge. Levand learned from Anderson that Briseno was his source of the high quality cocaine he was purchasing. (In the live proffer, Anderson did not state, as he had in his letter, that he told Levand that Briseno was known to keep, "at times," large quantities of money and cocaine at the restaurant.)

¶ 17 Anderson also offered testimony about why he did not come forward prior to December 2011 with this information. It was not until the summer of 2011 that Levand confessed to him while they were both at the McHenry County jail. "I always had an inkling after the situation in the parking lot, our conversation, and a week after the incident happened, you know, happening and me knowing Rusty, I always had an inclination. And that [*i.e.*, the confession] kind of confirmed it at that point." Anderson stated that he came forward with the information shortly thereafter because he had once been wrongly accused of a crime and he thought that, if someone had information to help him, he would have wanted that person to come forward. Anderson first tried to provide the information to authorities through a "tip line;" next, he sent the 2011 letter to defense counsel.

¶ 18 After Anderson took the stand to testify for a formal offer of proof, the trial court summarily reaffirmed its ruling excluding his drug testimony.

¶ 19 The defense also sought to exclude accomplices' Houghtaling's and Collett's testimony on the basis that the State had no good faith basis to call them and sought to call them solely to impeach them with out-of-court statements implicating defendant. The State argued with respect to Collett's testimony that he helped its case against defendant by placing defendant's group at the scene. As to Houghtaling's testimony, the assistant State's Attorney noted that he had not spoken to Houghtaling since the second trial and argued that, if Houghtaling recanted, he would be impeached

with prior testimony, which could only help the State's case. When the trial court asked defense counsel to distinguish the defense's calling DeCicco (who had also recanted) from the State's desire to call Houghtaling, defense counsel stated that its purpose in calling her was not to impeach her (because her confession was going to be substantively admitted), but to establish other facts: her group was near the crime scene, had a gun, and her car was burned after the fact. The trial court overruled defendant's objections. After trial commenced, defense counsel spoke with Houghtaling, who confirmed that he would deny any involvement in Briseno's death. Defendant renewed his objection before Houghtaling testified, and the trial court again overruled the objection.

¶ 20 B. Trial

¶ 21 1. Eduardo Pardo

¶ 22 Eduardo Pardo testified through an interpreter that he worked as a cook at the Burrito Express on March 6, 2001. At about 7:15 p.m. that day, two men wearing black masks (through which one could see only their eyes) entered the restaurant; one of them had a gun and wore dark clothing. Pardo was in the back area with Briseno. No customers were in the restaurant at this time. Pardo explained that the man with the gun, who was the taller of the two, entered first and spoke (in a language Pardo did not speak) while pointing the gun at Pardo and Briseno. Briseno, who had been preparing food before the men entered, raised the knife he had in his hand. The men ran out of the restaurant, and Briseno and Pardo chased after them. Pardo ran around in front of a nearby dry cleaners, and Briseno ran around the back of it.

¶ 23 The men ran across Third Street and ran out of sight between a house at the corner of Third Street and Waukegan Road. At some point when Pardo and Briseno were chasing the men, Pardo saw Briseno stop and talk to someone in a car, but he could not hear what was said. Across the

street from the dry cleaners, behind the Sullivan's Foods store, Pardo saw the man who did not have a gun (whom the State asserted was Houghtaling). He wore a green jacket. Pardo saw no one else at this time. Pardo caught up to the man in the green jacket after the man slipped and fell (backwards) on ice. It was nighttime and dark out. Pardo called out to Briseno and told him that he had one of the men; Briseno instructed him to walk the man back to the restaurant and call police. Pardo grabbed the man's arms from behind, and then walked him back toward the restaurant. When they reached Third Street, Pardo stopped and heard a gunshot. Pardo saw the man who held the gun in the restaurant (defendant, under the State's theory), and he saw Briseno. The man fired again. Briseno was close to Pardo, and he was coming toward Pardo and the man in the green jacket; all of the men were across Third Street from the restaurant. Briseno asked Pardo to walk him to the store so that they could call the police. The man with the gun followed them. Pardo heard two gunshots. Pardo held the man in the green jacket from behind with his arms hooked underneath the man's arms and raised up toward his neck. Briseno walked next to them. Pardo walked backwards, and Briseno walked forward.

¶ 24 After the second group of shots, the man with the gun came closer to Pardo and Briseno and started to shoot again. Pardo heard Briseno make a sound kind of like,"aah," and he spit blood out of his mouth. Briseno was facing the shooter and away from the man with the green jacket. Pardo could not see if Briseno spit any blood on the man wearing the green jacket. After Briseno spit blood, Pardo dropped the man in the green jacket, ran to the restaurant kitchen, and called 911. This took three to five minutes.

¶ 25 While Pardo was on the phone, he could see outside into the parking lot. He observed Briseno holding the man in the green jacket in front of him (with his arms outstretched and his hands

just lightly on the shoulders) and using him as a shield. "[H]e was moving him around while the other person kept shooting." Briseno moved one-half step to the left and then one-half step to the right. After he called 911, Pardo exited the restaurant. The two men were gone. He saw Briseno lying face down. There was a lot of blood, including foamy blood coming out of his mouth. After about 10 minutes, the police arrived. While he waited, Pardo tried to stop some cars on Route 120 to get help.

¶ 26 Addressing whether he saw the face of the man in the green jacket, Pardo testified that, behind the grocery store and before he picked him up, Pardo pulled off the man's mask while the man was still on the ground. About two seconds passed from the time he pulled it off and when he grabbed the man from behind. Also, it was dark behind the store. Pardo got a good look at his face: he observed the man's silhouette and all of his facial features. Addressing the shooter, Pardo stated that, at one point, the shooter had pulled up his mask to just above his eyebrows. The closest that Pardo got to the shooter after the shooter's mask was raised, and for only a couple seconds, was about 25 to 40 feet. Pardo further testified that he never saw a third man.

¶ 27 Subsequently, Pardo was interviewed by police and worked with a police sketch artist, who compiled sketches of the two men that he saw. When asked about the green jacket, Pardo described it as long and maybe made of leather. He could not recall if it had any other colors on it. Reviewing People's exhibit No. 66, Houghtaling's green jacket, Pardo stated that the jacket looked like the one he saw on the man during the shooting. (Houghtaling's jacket looks like green leather, does not have black around the collar, but has three front pockets and a zipper with a zipper flap; the jacket has areas of black on: the elbows, a patch just below the center of back of the collar, around the snaps for the zipper flap, horizontal strips above the lower pockets, and the logo on the breast pocket).

¶ 28 On cross-examination, Pardo testified that he could not recall telling a police interviewer four hours after the shooting that: the green jacket had some black and that the black was around the collar area, to his best recollection. He testified that he told the truth to the investigator, but was scared. Pardo also stated he could not recall if he told the investigator that he did not see any pockets on the front of the jacket, or that there was no zipper up the front.

¶ 29 According to Pardo, at one point, the shooter pointed a gun at him, while walking toward him with his mask pulled up above his forehead. Pardo had his back to the man and was running to call the police. He could not recall if he saw facial hair on the man's chin. He also could not recall if he told the sketch artist whether the shooter had a beard or mustache. (The two resulting sketches do not depict men with any facial hair.) While working with the sketch artist and on another occasion two days after the shooting, Pardo was shown photographs by police. He never identified anyone in the photos (which included photos of defendant, Houghtaling, and Collett).

¶ 30 2. Lieutenant Gary Wigman, Joanne McIntyre, and Medical Testimony

¶ 31 Gary Wigman, a lieutenant in 2001 with the McHenry police department, was in charge of the crime scene. He testified that police used metal detectors and magnets in their search for the murder weapon. None of the physical evidence gathered was connected to defendant or any of his alleged accomplices. Also, police never recovered any potential murder weapon linked to defendant or Houghtaling. Wigman explained that there are two broad categories of handguns: automatics and revolvers. An automatic ejects bullet casings after firing, and a revolver does not. Police found no casings in the vicinity of the Burrito Express and, so, they concluded that the gun used was a revolver.

¶ 32 Wigman further testified that he attended Briseno's autopsy and observed a laceration and abrasion on his upper forehead. Wigman stated that he has training in interviewing and interrogations, including at the John Reid school. Some information concerning the investigation was not released to the public and press, including the fact that Briseno had a head wound and that Pardo stated that Briseno had yelled into a passing car. This information was deliberately held back to assess the credibility of the people the police interviewed; if they had information that was not released, then that information carried more weight. The facts that were withheld from the public were included in the police reports that were eventually released to the defendants in the cases, as was the coroner's report. The fact of Briseno's head injury had not appeared in the press as of November 2001. Certain other information, including that the men wore ski masks and that Briseno struggled with one of the men in the parking lot, was released to the public. Wigman testified that warrants were obtained for the suspects in this case around May 6, 2001, and they were arrested either the following day or the day after that. After suspects are arrested, police reports are written and forwarded to the State's Attorney's office and any defendants. McMullen's 2002 trial and defendant's 2003 trial (both of which included testimony about Briseno's head wound) were covered in detail by the media.

¶ 33 Wigman confirmed that the police received leads concerning the DeCicco group members. On November 16, 2001, Wigman received a call from Vicki Brummett. He went to the Brummett residence and retrieved a .22-caliber revolver, which, under the defense's theory of the case, was linked to the crime. He forwarded the gun to the state police for testing; the gun was returned to its owner, David Brummett, on October 7, 2002. He spoke to the Brummetts five or six times.

¶ 34 Joanne McIntyre, an Illinois State Police firearms expert, testified that she examined the bullet recovered from Briseno's body and was able to identify the bullet as a .22-caliber long rifle bullet with six lands and grooves; she was unable to determine its twist. In December 2001, McIntyre received the Brummett gun, a single-action revolver, and fired 10 test shots with it and examined the fired bullets alongside the bullet recovered from Briseno's body. The Brummett gun is a .22-caliber revolver with six lands and grooves with a right-hand twist. McIntyre testified that she could not identify the Brummet gun as having fired the bullet that killed Briseno and she could not exclude it. McIntyre further stated that a .22-caliber is a very common type of gun, as are six lands and grooves.

¶ 35 Dr. Larry Blum, a forensic pathologist, performed the autopsy on Briseno on March 7, 2001. Blum observed a laceration on Briseno's head caused by contact with a blunt object. He testified that the injury was consistent with being pistol-whipped with the barrel of a gun. The injury was not consistent with falling on pavement. However, Blum made no determination as to when the wound might have occurred in relation to Briseno's time of death.

¶ 36 3. Justin Houghtaling

¶ 37 *(a) Direct Testimony at Defendant's Third Trial*

¶ 38 In his direct testimony, Houghtaling denied any involvement in the shooting. He stated that he never went to the Burrito Express on March 6, 2001. Houghtaling had known defendant for about three weeks as of that date. Defendant was dating McMullen at that time, and McMullan lived across the street from Houghtaling in Round Lake Beach.

¶ 39 On March 6, 2001, at about 6:30 p.m., McMullan and defendant came to Houghtaling's house, picked him up, and McMullan drove the group to pick up Collett and then to Cally Brown's

(McMullen's friend's) house in Wisconsin so that McMullan could borrow a laptop computer. From Brown's home, McMullen drove the group to McHenry, stopping first at Cloud 9, a "head" shop, and then went to Jimmy Wiesenberger's house. Wiesenberger was defendant's friend.

¶ 40 Houghtaling admitted that, in 2001, he pleaded guilty to the first-degree murder of Briseno and was sentenced to 20 years' imprisonment. When asked why he pleaded guilty to something he alleges he did not do, Houghtaling stated that he "was young. I was scared, and I thought it would be the quickest route to save myself from doing the extended time in prison of 60 years." He regretted it. Houghtaling conceded that, at his guilty plea, he told the court that he pleaded guilty of his own free will. Further, at his guilty plea, when asked if he wanted to say anything, he stated that he " 'wanted the family to know that I'm sorry that it went down. It wasn't meant to go down that way, and I hope you guys will find it in your heart to forgive me, okay.' " The following additional testimony was admitted substantively.

¶ 41 *(b) May 12, 2001, Interrogation in Omaha, Nebraska*

¶ 42 The State read a transcript of Houghtaling's May 12, 2001, interrogation in Omaha, Nebraska, and an audio recording of the interview was played to the jury. During the interrogation, Houghtaling told police that, on March 6, 2001, he, Collett, "J.D." (*i.e.*, McMullen), and defendant went to a house behind the Burrito Express and drank. Houghtaling and defendant went outside to smoke a "joint" and defendant stated to Houghtaling: " 'It was like come with me, I want to go do something.' "

¶ 43 Houghtaling agreed and followed defendant to the Burrito Express. At this point in the interview, police interrogators started asking some leading questions about face coverings. One investigator asked Houghtaling if he wore a ski mask. He replied, "I can't remember." The

investigator then asked, "You had your face concealed? Some how [*sic*] you had your face concealed is that correct?" Houghtaling replied in the affirmative. When asked, "How did you conceal your face? With some kind of a hat?" Houghtaling replied "Yes." Interrogators then asked, "With a mask over your face?" Houghtaling replied in the affirmative.

¶ 44 The police interrogators asked Houghtaling who first entered the restaurant, and Houghtaling replied that it was defendant (which was consistent with Pardo's testimony). Houghtaling also related, without suggestion, that only defendant carried a gun, specifically, a "little .22." When defendant demanded money after they entered the restaurant, one of the men behind the counter grabbed a knife and Houghtaling and defendant ran outside. The owner chased after them. When asked if Houghtaling ran toward a busy street or a side street, he replied that it was a side street and not Route 120 (*i.e.*, the busy street). When asked if anyone other than the owner chased them, Houghtaling replied, "not that I know of." At some point, someone grabbed Houghtaling, but he could not explain how the person grabbed or held onto him. He heard gunfire, and "I thought the dude let go of me and I ran. I was scared." Defendant was firing the gun toward the man with the knife (*i.e.*, Briseno). When asked again if more than one person was involved in resisting Houghtaling's and defendant's robbery, Houghtaling replied, "That could be—I can't—it happened so long ago and I don't remember. I'm not a hundred per cent [*sic*] positive, but it could be."

¶ 45 After Houghtaling was nonresponsive to a question asking where he went after he ran away, one of the interrogators asked, "Was anyone waiting anywhere with a car or anything like that?" Houghtaling replied that he could not recall and that he suspected they met back at the house and then left. When asked where they went, he stated that they took Collett home. The police then asked if they stopped at a head shop, specifically Cloud 9. Houghtaling replied that they did and that

Collett went inside and Houghtaling stayed in McMullen's car. The police asked Houghtaling to clarify whether, after the shooting, he entered McMullen's car or went to Cloud 9, and he agreed with the suggestion that McMullen waited for Houghtaling and defendant in her car on the street. When asked again later in the interview, he replied, "I think we got into a car. McMullen and Collett were in the car."

¶ 46 After police told Houghtaling that they had witnesses who saw him at Weisenberger's house after the shooting, he agreed that he went there. Houghtaling further stated that defendant planned the robbery. When asked again when he had the conversation with defendant about robbing the restaurant, Houghtaling replied, "I think a little bit in the car [on the way to McHenry] and at [Weisenberger's] house." They sat in the back of the car.

¶ 47 Initially, Houghtaling could not recall what he wore on the night of the shooting. Police then asked him if he had borrowed someone's jacket that night, and he replied that he had borrowed Collett's green jacket. Houghtaling did not see any scar on the victim's forehead. Defendant fired three or four shots.

¶ 48 Houghtaling described the gun. After noting that he knew what a semi-automatic is, he stated that the gun defendant used "looked like a revolver." However, Houghtaling could not explain the difference between a revolver and an automatic. After one of the interrogators drew a revolver and an automatic for Houghtaling, Houghtaling picked the drawing of the automatic.

¶ 49 *(c) April 3, 2002, Testimony at McMullen's Trial*

¶ 50 Houghtaling testified at McMullen's trial on April 3, 2002. (At the third trial, Houghtaling testified that no one forced him to testify at McMullen's trial and that he made the statements of his own free will.) He stated that, on the day of the shooting, he and defendant first discussed the

robbery earlier that day at Houghtaling's house. While there, defendant gave Houghtaling a ski mask. Houghtaling wore Collett's green jacket. Defendant and Houghtaling put on ski masks before they entered the Burrito Express; defendant entered first with the gun in his hand. There were two people in the restaurant, and no customers were inside. Defendant, pointing his gun at Briseno, demanded that they give him all of their money. Briseno picked up a knife, and Houghtaling and defendant ran outside. Houghtaling ran up an incline behind the cleaners, slipped, was grabbed by Briseno and Pardo, and dragged back to the restaurant. While being dragged, one of the men grabbed Houghtaling's hat; he heard shots fired. Houghtaling was facing outwards and saw defendant firing the shots; defendant fired about four to six shots toward Briseno.

¶ 51 After the last shot was fired, Houghtaling that he felt a jerk/twitch; Briseno had been hit. Briseno fell, and Pardo ran to the restaurant. When Briseno let go of Houghtaling, Houghtaling ran away. McMullen suggested that they should go to Cloud 9 for an alibi.

¶ 52 *(d) August 13, 2008, Testimony at Defendant's Second Trial*

¶ 53 On August 13, 2008, Houghtaling testified at defendant's second trial. In his direct testimony, Houghtaling stated that he and defendant, wearing masks, went to the Burrito Express at about 7:21 p.m. Defendant, holding a pistol (a revolver), announced a robbery. The owner picked up a knife, and Houghtaling and defendant ran outside. Houghtaling slipped on ice, and Briseno and Pardo wrestled with him. During the struggle, Briseno and Pardo pulled up Houghtaling's mask. Houghtaling tried to escape, but Pardo put a knife to Houghtaling's throat. Houghtaling then stopped struggling. Defendant began firing shots. Houghtaling felt Briseno jerk and let go and then Pardo let go. Houghtaling ran to McMullen's (white) car. Houghtaling did not know where defendant went. McMullen and Collett were in the car; McMullen drove. However, he also testified that,

when he got back in the car, he said to defendant, "Are you fucking out of your mind." Defendant replied, "I did what I had to do." They went to Weisenberger's house and stayed until 7 a.m. the next day. Houghtaling wore a green jacket on the night of March 6, 2001.

¶ 54 On cross-examination at defendant's second trial, Houghtaling recanted his direct testimony, stating that he had been forced to lie, "because they want to convict [defendant] for a crime he didn't commit, none of us committed." He claimed that, "They said if I don't give the testimony that they want me to testify to that they would revoke my plea agreement." He further testified that he read about the case in newspaper articles and read discovery and, thus, was able to testify about it on direct examination. Houghtaling admitted that he wore the green jacket on the day of the shooting and on the following day.

¶ 55 On redirect, Houghtaling acknowledged that, when he told police in Omaha that defendant planned the robbery, Houghtaling had not negotiated any plea with the State. He also acknowledged that he did not have any police reports at the time of the Omaha interview.

¶ 56 *(e) Cross-Examination and Additional Testimony at the Third Trial*

¶ 57 On cross-examination during defendant's third trial, Houghtaling denied involvement in the shooting. Houghtaling testified that he met with police on March 7, 2001, the day after the shooting. Between March 6, and May 12, 2001, (the Omaha interview), Houghtaling learned certain details about the case, including from newspaper accounts. In his Omaha statement, Houghtaling included the fact that the shooting occurred at the Burrito Express, a fact he learned from newspapers and talking to people.

¶ 58 Houghtaling testified that, on the day of the shooting, he was at his house. At about 6:20 or 6:30 p.m., defendant and McMullan came to his house. They stayed for 10 to 15 minutes and then

the group went to Collett's house. It took about 20 minutes to reach Collett's house. After about 5 or 10 minutes, the group went to Twin Lakes, Wisconsin, to Cally Brown's (McMullen's friend's) house. McMullen wanted to borrow a laptop from Brown (Cally's mother refused permission for McMullen to use it). The group left Brown's house at about 8 p.m. or earlier. On the way back, they stopped at Cloud 9; Collett wanted to go there. Collett went inside for 5 to 10 minutes. Next, the group went to Weisenberger's house, which was next to the Burrito Express. On the way there, Houghtaling noticed police cars with flashing lights near the Burrito Express. The group spent the night at Weisenberger's house. Houghtaling wore Collett's green jacket, including to the police station on March 7, 2001.

¶ 59 Addressing the Omaha interview, Houghtaling testified that he was on his way to California, when police pulled him off of a bus and arrested him. He was 19 years old and had taken hallucinogenic drugs. He was high. The 45-minute interview commenced at 1:30 p.m. At this point, the tape recorder was not turned on. Houghtaling told the officers that he had taken drugs earlier that day. Houghtaling denied involvement in the shooting. The officers (falsely) informed Houghtaling that defendant, McMullen, and Collett had already been charged and had given statements. The interrogators told Houghtaling that, if he told them what happened, they would help him out. Next, at 1:45 p.m., they turned on the tape recorder and elicited his statement. Houghtaling testified that the officers asked leading questions. On November 14, 2001, Houghtaling pleaded guilty; he was sober.

¶ 60 Houghtaling stated that, after he testified at McMullan's trial and after she was convicted, he wrote her an apology. He further testified that, at the time of defendant's second trial in 2008, he had access to all of the discovery in the case, including police and forensic reports. Also, before

he testified against McMullen, he prepared with representatives from the State and his recollection was refreshed. After he testified at defendant's second trial, Houghtaling was charged with perjury, (voluntarily) pleaded guilty to that charge on June 23, 2009, and was sentenced to 5 1/2 years' imprisonment. He also stated that he could be charged with perjury for his testimony at the third trial. Houghtaling explained, "I'm tired of lying. The truth has to come out sooner or later."

¶ 61 Houghtaling conceded that he testified at the second trial that he wrote letters to the State's Attorney requesting a reduced sentence and money in exchange for testimony. He also referred to assistant State's Attorney Robert Beaderstadt as "a little bitch faggot." At the third trial, he further testified that Beaderstadt offered him money for his testimony, but never gave Houghtaling the money.

¶ 62 Two aspects of Houghtaling's testimony were excluded from trial. First, defendant sought to elicit testimony from Houghtaling that he had been called to testify against defendant at his first trial in 2003; that Houghtaling refused to testify; and that the reason he refused was that defendant was not involved in the shooting. The State raised a relevance objection to this testimony, and the trial court sustained the objection. Second, defendant sought to elicit testimony from Houghtaling that he learned the basic facts in his May 2001 Omaha statement from news accounts and word of mouth. The State raised hearsay and foundation objections. The trial court sustained the objections. Defense counsel made an offer of proof:

> "Your Honor, I would ask Mr. Houghtaling and I believe he would testify as follows: That the following items he had learned either from the press or from people in the time frame prior to his May 2001 statement: That the police thought that the shooting was about 7:20 p.m.; that the police thought that there were two young men involved. The police

thought that one man had a handgun; that the police thought that both went into the store; that the police thought that both were wearing black ski masks with eye holes; that the police thought that Mr. Briseno was in the Burrito Express with one employee; that the police thought that Mr. Briseno was using a butcher knife at the time; that the police thought masked men ordered Briseno to give them money.

***

That the police thought that Mr. Briseno and the employee chased two men out of the restaurant; that the police thought that Mr. Briseno caught one of the masked men outside the restaurant; that the police thought Mr. Briseno struggled with one of the masked men in the parking lot; that the police thought Mr. Briseno was shot by another masked men [*sic*].

I would also ask Mr. Houghtaling whether he understood that the possibility that Mr. Briseno had been pistol[-]whipped was in the public [*sic*], and he would testify that he understood that was not in the public [*sic*]."

¶ 63 The trial court sustained a foundational objection to the testimony, noting that it would not allow defense counsel to ask the questions "without giving some specificity to where Mr. Houghtaling had learned that specific information. From the newspaper? From an individual? From what officer? Who, what, when and where." Defense counsel urged that, over the many years since the crime occurred, Houghtaling would not be able to supply such a level of detail. The court reiterated that it sustained the objection.

¶ 64 4. Detective Sergeant William Brogan

¶ 65 On May 12, 2001, William Brogan, a detective sergeant with the McHenry police department, interrogated Houghtaling in Omaha. (McHenry police department detective John Jones

was also present.) Brogan was the lead detective. Houghtaling was *Mirandized*. He showed no signs of being under the influence of drugs or alcohol; however, Brogan did not ask Houghtaling if he was on drugs that day.

¶ 66 Brogan also spoke to Houghtaling on November 12, 2001, at the McHenry County correctional facility. Houghtaling told Brogan that, as they walked to the Burrito Express, defendant "gave him a black knit ski mask and told him to put it on." Houghtaling told Brogan that he wanted defendant to think he was a tough "gang banger" and could handle himself. He also related that he and defendant ran out of the restaurant with Houghtaling being in the lead and that Briseno and the other man chased after them. Brogan asked Houghtaling how he knew that Briseno had been shot and he replied, "it doesn't take a genius to figure it out."

¶ 67 On cross-examination, Brogan testified that he had training in the John Reid interrogation technique. Part of the training is that intentional abuses of medications or drugs can cause an innocent subject to appear confused or disoriented. During an interrogation, police attempt to elicit information to corroborate a confession, which can take two forms: (1) independent corroboration, which involves the subject supplying information unknown to the investigator, such as the location of an unrecovered murder weapon, which can be verified; and (2) dependent corroboration, where a suspect demonstrates knowledge of facts about a crime that police have kept secret from the public (*e.g.*, the pistol-whipping or the shout into a passing car). Brogan further testified that investigators try to avoid using leading questions, which are less reliable than nonleading questions. During Houghtaling's interrogation, the investigators first used certain words, including "handgun," "grabbed," and "gunfire."

¶ 68 Brogan testified that the following information was public at the time of the Omaha interview: the shooting occurred at 7:20 p.m. at the Burrito Express; two men were involved and one had a handgun; that they entered the store wearing black ski masks with eye holes; Briseno and Pardo were in the restaurant when the men entered; the men order Briseno to give them money; police thought that Briseno and his employee chased two men out of the restaurant; Briseno had a butcher knife when he was in the restaurant; Briseno, after he and his employee chased the two men outside, caught one of the masked men; Briseno struggled with one of the masked men in the parking lot and was shot by the masked man with which he was not struggling. However, Brogan testified that the fact that Briseno had a wound on his head caused by the blunt object (*i.e.*, a pistol-whipping) was not publicly disclosed, nor was the fact that Briseno had yelled something into a car.

¶ 69 Brogan further stated that about 15 minutes of interrogation preceded the recorded portion. (Detective Jones prepared a summary of the 15-minute portion of the interview.) During that time (*i.e.*, at the beginning of the Omaha interview), Houghtaling denied involvement in the shooting. Police (falsely) told him that defendant, McMullen, and Collett had been charged in the case (actually, McMullen had given a statement) and that Houghtaling could help himself if he gave a statement. Houghtaling then said that he was involved and wanted to give a statement. Brogan further testified that, also at this time, police believed that the murder weapon was a .22-caliber revolver. This was based on McMullan's statement that she had observed defendant with a revolver and because there were no casings found at the scene. Further addressing the interview, Brogan testified that there were a number of long pauses before Houghtaling answered a question.

¶ 70 According to Brogan, during the Omaha interview in May 2001, Houghtaling first suggested the following answers in response to nonleading questions: that the gun was a .22-caliber weapon and that his jacket was green.

¶ 71 5. Detectives John Jones and Jeff Rhode

¶ 72 McHenry police detective John Jones testified that he spoke to defendant on May 12, 2001, asking who he was with on the night of the shooting. Defendant stated that he was with Collett and McMullen; when asked whether he was also with Houghtaling, defendant replied that he did not know Houghtaling.

¶ 73 Jeff Rhode, who was a detective with the City of Woodstock and a member of the Major Investigations Assistance Team assisting in the Burrito Express shooting, testified that he interviewed Pardo on the evening of the shooting. He asked Pardo if the jacket worn by one of the suspects was a solid color, and Pardo replied that it was green with some black on it, but that he did not remember well. The next day, at 11:30 a.m., Rhode interviewed defendant, asking him who he was with the prior evening. Defendant responded that he was with "Jennifer, Justin and Dave as I recall. Culick (phonetic) I believe is how he stated his last name."

¶ 74 6. David Collett

¶ 75 On direct examination, David Collett denied knowledge of who robbed the Burrito Express. He testified that he does not know who shot Briseno. On September 13, 2001, he pleaded guilty to attempt armed robbery of the Burrito Express. He explained that he did so because it was "a plea of convenience" and because he did not want to take any chances. Collett wanted to avoid a long prison term if he was convicted. He was represented by an attorney, and no one forced him to plead guilty.

¶ 76 At his sentencing hearing, Collett stated to Briseno's widow (who had testified to the impact his death had on her life):

> " 'I'd just like to say that I'm no—no apology—nothing I can possibly say can help the victims with what they're dealing with, but I can offer my apologize apology [*sic*]. I really if I would have known that any of this would have happened, I really would have tried to do something to stop it, but, honestly, I mean, I really didn't think that anything like that would have happened was going to happen. If the judge, [*sic*] I will follow through with it completely and to the Court's satisfaction. I would just like to apologize again to the victims for their loss. Thank you.' "

Collett denied that he apologized because he had remorse for what he did, explaining that he apologized because "of the grief she was going through."

¶ 77 Collett further testified that, on the evening of March 6, 2001, he was with defendant and Houghtaling. Collett had known defendant for a couple of months and currently has no relationship with him. They were at Collett's father's house near Fox Lake. McMullen picked them up, and they left for Wisconsin to obtain a laptop from Cally Brown. On the way back, they planned to go to Weisenberger's house behind the Burrito Express, but Collett got into an argument with Houghtaling. According to Collett, Houghtaling would not return his green coat and it was cold out. McMullen, who drove, pulled the car over, and defendant told Collett to get out to blow off some steam. Collett walked to Weisenberger's house (which took a couple of minutes), but Weisenberger was not home. Collett then went to Cloud 9, which had recently opened. On his way, he heard a noise that sounded like a car backfiring. However, on May 12, 2001, Collett told police that, as he walked behind the Burrito Express and up to Weisenberger's backyard, he heard what could have

been two gunshots. Collett explained at the third trial that the police suggested that the noise could have been gunshots; Collett never heard shots.

¶ 78 Collett could not recall where defendant and Houghtaling were when Collett heard the car backfiring and could not recall if, on the way to Cloud 9, he turned around and walked back toward McMullen's car. However, on May 12, 2001, he told police that he walked back to the car and that defendant and Houghtaling were in the car. At the third trial, Collett denied talking to defendant afterwards about what happened at the restaurant. On May 12, 2001, however, he told police that, when he got into McMullen's car, defendant stated that some "kids" just robbed the Burrito Express.

¶ 79 Collett went to Cloud 9. As recorded on a surveillance tape, he first appeared in a back room area at 7:38 p.m. and left that area at 7:44 p.m. After he walked out, he got in the car with McMullen, defendant, and Houghtaling, and went to Weisenberger's house. (Collett was the only one with valid identification, which was required to enter Cloud 9.) He drank and watched television. Collett denied that he spoke to defendant about the incident. He explained that they only discussed what they learned in news reports. On May 12, 2001, Collett told police that he asked defendant what happened at the Burrito Express and that defendant stated " 'just had some fun.' " Collett testified that he would not have lied to the police "beside the fact that I was 18 and scared."

¶ 80 On cross-examination, Collett testified that, after he had visited Cloud 9 and on the way to Weisenberger's house in McMullen's car, he saw police, squad lights, and a crowd. He stated, "I wonder what's going on," and the others in the car replied that they did not know. When they reached Weisenberger's house, Weisenberger had returned home and the group went inside. At some point, Weisenberger's brother joined them that night. Collett could not recall any scratches,

bruises, or blood on defendant or Houghtaling. At one point, Collett and Weisenberger left to purchase beer. The group spent the night at Weisenberger's house. Collett drank all night.

¶ 81 Collett denied seeing any weapon on the night of the shooting or seeing anybody with a ski mask. He also denied knowing DeCicco, Hiland, or Levand.

¶ 82 7. Defendant's Case - Detective Richard Solarz

¶ 83 Detective Richard Solarz interviewed Houghtaling on March 7, 2001, at the McHenry police department. Houghtaling wore the green jacket to the police station. Solarz did not observe any blood stains on the jacket, nor did he notice any scratches on Houghtaling's face or hands.

¶ 84 8. Sergeant Michael Brichetto

¶ 85 Sergeant Michael Brichetto of the McHenry County Major Investigations Assistance Team testified that he interviewed Pardo on March 8, 2001. Brichetto showed Pardo a photo array of five photographs, including those of defendant, Collett, Weisenberger, and Houghtaling. Pardo did not identify any of the photos as being someone involved in the incident. Brichetto testified that he was unaware when the photos of defendant and his group were taken that were included in the photo array. He stated that Pardo was not shown photos of defendant and Houghtaling that were taken after the incident. The photo of defendant in the photo array depicts him with facial hair. Pardo was not shown a photo *lineup*, which is a photo setup where individuals with similar characteristics are selected so as not to tilt the selection in any particular way.

¶ 86 9. James Weisenberger

¶ 87 James (Jimmy) Weisenberger, age 34, testified that he has known defendant since Weisenberger was 14 years old and that they are good friends. On the evening of March 6, 2001, defendant, Houghtaling, Collett, and McMullen came to his house. Before they arrived,

Weisenberger observed police activity in the area around the Burrito Express in the plaza behind his house. Addressing defendant's appearance that evening, Weisenberger testified that defendant had facial hair (a moustache and goatee). Houghtaling wore a green jacket. He could not recall what Collett wore that evening. Weisenberger did not notice any blood or scratches on his guests, nor did he observe ski masks, weapons, bullets, or bullet shells. Weisenberger did notice that defendant and Houghtaling were about the same height. Later that evening, Weisenberger rode in McMullen's car and did not notice any blood, guns, bullets, or ski masks inside the car. Over defense counsel's objection, Weisenberger testified that he has twice tried cocaine, taken "random pills," and smoked marijuana (as a teenager).

¶ 88 10. Levand's Confession to Patrick Anderson

¶ 89 Patrick Anderson testified that he is currently incarcerated. He lived in McHenry in 2001 and was good friends with Levand, whom he called Rusty. He also knew Susanne Dallas DeCicco, who was Levand's girlfriend at the time.

¶ 90 In the summer of 2011, Anderson was incarcerated in the McHenry County jail, as was Levand. In July, Levand told Anderson that he was involved in the Burrito Express shooting. Levand related that he and DeCicco's cousin (*i.e.*, Hiland) attempted to rob the restaurant. Briseno chased them outside, and Levand fired over his shoulder and shot Briseno. Hiland called Levand for help, and Levand hit Briseno on the head with the gun. They fled and met with DeCicco. Levand and Hiland got into DeCicco's car and went to Levand's mother's house to clean up (Hiland was covered in blood). They burned the masks and clothes they wore and tried to clean up DeCicco's car (there was blood on the back seat). They were unable to clean the car, and, several

month later, Levand stole DeCicco's car and burned it somewhere in Wisconsin.[5] Levand further told Anderson that he was not worried about being prosecuted because the State had the gun for several years and nothing had come of it.

¶ 91 Anderson was incarcerated in McHenry in 2001 at the same time as defendant, but he does not know defendant. Defendant never told Anderson about this case. Anderson approached defendant with the information he had from Levand and wrote to defense counsel.

¶ 92 On cross-examination, Anderson was told that Levand was actually in jail from June 6 through June 10 of 2011. Anderson testified that "when you're in jail, you really don't pay attention to the months because you're doing time" and that the date could have been June instead of July. In 1993, Anderson was convicted of aggravated criminal sexual assault; in 2001 and 2005, of possession of a controlled substance; and in 2005 and 2006, he was convicted of retail theft. Anderson was found guilty in 2011 of attempted unlawful possession of a handgun by a felon and delivery of a controlled substance.

¶ 93 11. DeCicco's Confessions to Sergeants Doug Vandermaiden and Virgil Schroeder

¶ 94 Susanne Dallas DeCicco gave two videotaped confessions to police: one in November 2005 and another in January 2006. Both were played to the jury.

¶ 95 *(a) DeCicco's 2005 Confession in Quincy*

[5]By stipulation, defendant presented police testimony that DeCicco's car was found on June 27, 2001, in Racine, Wisconsin, destroyed by fire. A preliminary investigation revealed that an accelerant burned the vehicle.

¶ 96 Sergeant Doug Vandermaiden, a patrol sergeant with the Quincy police department, testified that he participated in the first interview, on November 19, 2005. Vandermaiden testified that in November 2005, he worked as a patrol officer with the Quincy police department and came into contact with DeCicco on November 5, 2005, at a Kohl's retail store to investigate a retail theft; DeCicco was a suspect. DeCicco provided as her name "Elizabeth Schwartz." He arrested her, and she was released the same day. Vandermaiden testified that he next spoke to DeCicco on November 18, 2005, on the telephone; he wanted her to come to the police station to discuss why she gave a false name and to discuss the Burrito Express shooting. He promised her that, if she was truthful, he would issue a citation and release her. Vandermaiden interviewed DeCicco two times on November 19, 2005. DeCicco arrived with her mother and her boyfriend. The first interview was videotaped. DeCicco was questioned about her prior statements concerning the Burrito Express shooting and stated that she had made up her story and that it was a joke. She denied involvement in the shooting. In the second interview, most of which was recorded, DeCicco denied involvement in the shooting. Vandermaiden issued DeCicco a citation for retail theft and released her that day. Vandermaiden spoke with DeCicco's boyfriend and with Elizabeth Schwartz. During the completion of the booking process, Vandermaiden made a comment about the shooting and DeCicco bowed her head, started crying, and stated that " 'they made me do it.' " As Vandermaiden walked out to commence a third interview, DeCicco stated that she was surprised that nothing happened when they picked up the gun and that her cousin had hired an attorney because he thought something was going to happen. DeCicco stated on an audiotape that, on the night of the shooting, she was with Levand and Hiland and that Levand was the shooter. Vandermaiden promised DeCicco that she would not be arrested until after Thanksgiving (the following Thursday).

¶ 97 During the (third) videotaped interview, DeCicco stated that Briseno was murdered on March 5, 2001, the date her niece was born. She, her boyfriend Levand, and her cousin Hiland committed the crime. DeCicco's sister went into labor that day, and the group went to the hospital. DeCicco sent Levand and Hiland to her mother's house to get the maternity bag. They took DeCicco's vehicle, a 2001 silver, 2-door, Chevy Cavalier, and were gone about 1 1/2 hours. (It should have taken 30 minutes.) When Levand and Hiland returned, they were acting funny. DeCicco further stated that, from the hospital, the three went to her biological father's, Ben DeCicco's, house and, outside, Levand and Hiland started going through her car's trunk; inside was a gun (a revolver) wrapped in a towel. It was her stepfather's, David Brummett's, revolver. (One day, DeCicco saw Levand and Hiland going through her stepfather's bedroom and they mentioned a gun.) DeCicco saw the gun and told Levand and Hiland to put it back. Levand and Hiland left at one point, and, after 20 minutes, DeCicco drove to look for them. (" '[T]hey had talked before about snatching purses or robbing somebody to get money.' ") She found them near the Burrito Express. She saw them run into the restaurant and, later, run back out, as did the two men who worked there. All four ran across the street in front of her car, and one of the Hispanic men turned around and yelled something inside DeCicco's car. She kept driving.

¶ 98 DeCicco returned to her driveway and heard six gunshots. Levand and Hiland ran out of the woods behind her house. Hiland's face was covered in blood, and he had a cut on his hand. The men got into DeCicco's car (Levand in front and Hiland in back) and ordered her to drive way. When Hiland entered her car, DeCicco saw blood. Hiland told her it was not his own blood. She knew at this point that they had a gun. Levand threw the gun on the back seat, and Hiland cleaned it. First, DeCicco drove to Levand's grandmother's house (where they threw out a scarf or gloves)

and then she drove to her mother's, Vicki Brummett's, house. At this point, Hiland carried the gun. Hiland put the clothes in a bag and burned them the next day. Hiland and Levand cleaned the gun (he pulled out Briseno's hair from it) and returned it to her stepfather's home. DeCicco told her sister of the incident, who, in turn, told their mother. DeCicco's mother called the police, who subsequently collected the gun. (DeCicco also told her story to her friend Brittany Tyda.)

¶ 99 DeCicco then stated that a detective, Roger Pechous, came to her McHenry County jail cell at one point late at night and told her that the wrong people had been arrested. However, he next stated that he was joking. He also stated that a detective Brown was a new detective for the "bad guys" and that DeCicco did not have to speak to him and that there were rumors that he had beaten a confession out of one of the suspects. Brown was trying to help defendant. DeCicco stated that Pechous did not intimidate or coerce her or promise her anything. Pechous recommended to her that she not speak with Brown and that she not tell anyone that Pechous came to speak to her. DeCicco believed that Pechous knew that her group was guilty.

¶ 100 Levand told her that one of the men in the restaurant threw a knife at him and Hiland, who then ran out of the restaurant. Levand also told DeCicco that one of the restaurant workers caught Hiland and dragged him across the parking lot. Levand became frantic and started shooting. The final shot hit Briseno. Levand heard him say "uhhhh" and spit blood on Hiland. Briseno raised his knife and struggled with Hiland and Levand came up and hit him on the head. Months later, DeCicco's car was stolen. Levand and Hiland took her car to Wisconsin and burned it because it had bloodstains on the back seat.

¶ 101 DeCicco also related that she told her sister, mother, and a friend that Levand and Hiland committed the robbery, but she did not contact police out of fear of being hurt by Levand and Hiland. Her mother and sister spoke to police about the incident.

¶ 102 *(b) DeCicco's 2006 Confession*

¶ 103 Turning to DeCicco's second confession, Sergeant Virgil Schroeder of the Illinois State Police testified that, in January 2006, he (and William Kroncke) interrogated DeCicco, who was incarcerated at the Dwight correctional facility (for retail theft). They interviewed her at the State's request. The state police never arrested DeCicco, Levand, or Hiland for the Burrito Express shooting. Schroeder testified that DeCicco made accusations against members of the McHenry police department. The state police investigated such allegations, and there was no finding of malfeasance by the McHenry police department.

¶ 104 In DeCicco's 2006 version of the events, she stated that the shooting occurred either on March 5, or 6, 2001. She first mentioned that Levand and Hiland each wore masks when they entered the Burrito Express, but later, when asked why Levand or Hiland (it is unclear to whom the interrogators are referring) had to clean blood off his face when he wore a mask, she stated that Levand wore a mask and Hiland wore a scarf over his face. She also stated that Hiland had (Briseno's) blood on his face and that had dripped onto his shirt. At another point in the interrogation, DeCicco described Hiland and Levand as both covered in blood (" 'they were covered in blood' "). By the time they reached DeCicco's mother's house in Johnsburg, Levand had cleaned off the blood from his face. When asked how she knew that Levand and Hiland had a gun when they arrived at her father's house from the hospital, DeCicco stated that she saw them looking through her car's trunk and, although she did *not* actually see the gun, she knew for certain later when she

saw it near the restaurant that that was what they were handling in her trunk. (In her 2005 version, DeCicco stated that she did see the gun when Levand and Hiland unwrapped the towel; she described it as a revolver; and stated that she told them to put it back inside the house.) In 2006, DeCicco stated that she saw the gun twice: when Levand and Hiland entered the restaurant and when Levand ran toward her car. Also in this version, DeCicco stated that Levand sat in the front seat with the gun. (In 2005, she told the interrogators that Levand threw the gun on the back seat.)

¶ 105 DeCicco also stated that Pechous came to her cell in the jail late at night and told her not to speak to the new detectives and not to tell them that Pechous came to see her. When the interrogators told her that Pechous' visit was not secret (because he had written a report about it), that he reported a second visit, and that he did not report that he met with her in the middle of the night, DeCicco responded, "It's been a while."

¶ 106 DeCicco noted for the interrogators that the fact that Briseno was hit in the head with the gun " 'was not in the papers anywhere. How would I know that unless the people who did it actually told me?' " She was uncertain if she heard six gunshots.

¶ 107 DeCicco stated that she spoke to McMullen while they were both incarcerated in the McHenry County jail and that McMullen stated that another woman in the jail was claiming that she was involved in the shooting. McMullen denied that she was involved in the shooting. DeCicco had told McHenry police that she never told anyone that she was involved and that she never told a cell mate. When confronted with these inconsistencies, DeCicco stated that she was scared.

¶ 108 DeCicco also mentioned during the interrogation that Hiland told her that he saw an attorney because "they thought—after they took, after they took the weapon, everybody thought we were going to jail."

¶ 109 The interrogators next confronted DeCicco about statements she had made to the McHenry police department. DeCicco had initially told the police that she lied about her group's involvement in the shooting. DeCicco denied this to the interrogators and denied that she told them she had never been in a cell with McMullen. DeCicco also told interrogators that she first told her sister about the incident, but later told her it was not true.

¶ 110 12. DeCicco's Confession to Vicki Brummett (DeCicco's Mother)

¶ 111 Vicki Brummett, DeCicco's mother, testified that she is married to David Brummett. She has been convicted of possession of a controlled substance. In March 2001, DeCicco, Levand, and Hiland lived, off and on, with Brummett in her home in Johnsburg. When she was not living with Brummett, DeCicco lived with Ben DeCicco, her biological father, in McHenry on Waukegan Avenue near the Burrito Express. On March 6, 2001, Brummett was at the hospital with her daughter Elizabeth Schwartz, who had just had a baby. She left the hospital after dark and went home. On her way, she saw police activity near the Burrito Express. When she arrived home, DeCicco, Levand, and Hiland were at her house in the basement. Prior to the shooting, Hiland did not have scratches on his body; however, afterwards, his hand and knees had scratches on them.

¶ 112 Brummett's husband, David, owned a handgun that he kept in their bedroom closet; it was wrapped in a blue towel. Others in the household had access to the bedroom. Around November 2001, Brummett gave the gun to police. At about the same time, she had a conversation with DeCicco about the Burrito Express shooting. DeCicco confessed to her mother, telling her that, on the evening of March 6, 2001, DeCicco drove to pick up Levand and Hiland and found them standing outside the restaurant. Levand and Hiland ran inside and, later, everyone ran out. One man ran in front of DeCicco's car and yelled for her to call the police. DeCicco told Brummett that she

drove home. She also told her mother that the gun belonged to the Brummetts and that "the guy was hit with the gun and that she thought they'd find out—we'd find out that they used the gun because there was a crack in the barrel—or the handle."

¶ 113 Brummett's granddaughter was born on March 5, 2001, not the following day. Brummett conceded that DeCicco has a drug problem and has asked Brummett for money and has lied to her on more than one occasion. The day that Brummett heard the sirens was the day *after* her granddaughter was born.

¶ 114 13. Brittany Tyda, Elizabeth Schwartz, and Carly Rexford

¶ 115 Brittany Tyda, a childhood friend of DeCicco's and Levand's, testified that DeCicco confessed to her about the Burrito Express shooting in October 2001. DeCicco and Levand were at Tyda's apartment in McHenry. DeCicco spoke to Tyda about the shooting; she cried and was upset and stated that she saw Levand and Hiland attempt to rob the Burrito Express. DeCicco related that the store manager grabbed Hiland and had a knife; Hiland screamed for Levand, and Levand shot the manager. DeCicco made another statement about the shooting. While they were in Tyda's apartment, DeCicco told Levand that, if he went to the police about DeCicco writing bad checks (which he had threatened to do), then "she would go to the police about him shooting someone." They were having an argument. Within one year of the shooting, Tyda spoke to McHenry police. She could not recall if she told police that DeCicco lived with her and that she kicked out DeCicco.

¶ 116 Elizabeth Schwartz, DeCicco's sister and Hiland's cousin, testified that she is currently incarcerated for retail theft and has previous convictions for forgery and burglary. Schwartz testified that DeCicco visited her in the hospital on March 6, 2001. Schwartz's daughter was born the previous day. At that time, DeCicco lived with Ben DeCicco near the Burrito Express. About three

weeks after the shooting, while they were at the Brummett residence, DeCicco told Schwartz that Hiland was involved in the Burrito Express shooting. DeCicco did not provide any additional information. Schwartz told her mother. Schwartz further testified that, in the week following the shooting, she noticed that Hiland had cuts on the inside of his hand and bruises on his arm. He told Schwartz that he had fallen down her father's (Ben DeCicco's) back stairs.

¶ 117 Two to three months after the shooting, Hiland confessed to his cousin, Schwartz. They were in her van outside a restaurant near the Burrito Express. Hiland did not want to exit the van, fidgeted, became irritated and panicked. Schwartz told Hiland that DeCicco told her that he was involved in the shooting. He replied, " 'She is a fat fucking bitch and she can't keep her mouth shut. She needs to keep her mouth shut.' " Hiland asked Schwartz to drive away. As they drove away, Hiland stated that the DeCicco group had been smoking crack on the night of the shooting and that DeCicco dropped off Hiland and Levand at the Burrito Express. Hiland and Levand went inside the restaurant to rob it, but they were chased out. Schwartz explained that, "Well, one of them got ahold of my cousin [*i.e.*, Hiland] with a knife and when he was trying to stab him, he was forced to grab hold of it, yelling for [Levand] to help. And I'm not—I can't remember which way it went, whether [Levand] was shooting while he was running or if he had to come up and hit him in the head and he still wouldn't stop, so then he shot him. I can't remember how it went." Schwartz clarified that she could not recall if Levand hit Briseno first (she was uncertain with which part of the gun) or shot him first. DeCicco picked them up afterwards. In 2003, Schwartz stated in a written statement that Levand hit Briseno with the butt of the gun.

¶ 118 Schwartz further testified that, when DeCicco is arrested, she sometimes uses Schwartz's name. Addressing DeCicco's reputation for truthfulness, Schwartz testified that she is not always truthful with others.

¶ 119 Carly Rexford, DeCicco's half-sister (their father is Ben DeCicco), testified that she visited Schwartz at the hospital on March 6, 2001. DeCicco was there, too, but left before Rexford, stating that Levand and Hiland were waiting for her in her car. At the end of 2005, DeCicco and Vicki Brummett were at Rexford's home in McHenry. DeCicco told Rexford that she confessed to police about the Burrito Express shooting because it had been weighing on her conscience. DeCicco told Rexford that Hiland and Levand took David Brummett's gun and that the victim grabbed Hiland and that Levand shot him. Levand had threatened her that, if she ever told anyone about their involvement, she would be punished. Rexford had heard that DeCicco and Levand had a stormy relationship, but never witnessed it. She had also heard that DeCicco used narcotics, but never witnessed it.

¶ 120 14. Hiland's Confession to R. Daniel Trumble

¶ 121 R. Daniel Trumble testified that he has a conviction related to writing bad checks. He knows DeCicco; she is the sister of a longtime friend (Christopher Schwartz). Trumble lived with Hiland in 2001 or 2002. Trumble testified to about three conversations he had with Hiland in the summer of 2002. During the first conversation at their home, Hiland told Trumble that the wrong people had been arrested for the murder and that he was involved in it, along with two others (DeCicco and Rusty). During his confession to Trumble, Hiland was shaking and crying. They had been drinking. Hiland further told Trumble that the three went to rob the restaurant and that "it had gone wrong" because one of the workers pulled a knife; Levand shot him.

¶ 122 At this point in the proceeding, the trial court sustained the State's relevance objection to Trumble's testimony concerning Hiland seeing an attorney. Defense counsel made the following offer of proof. Trumble would testify that he told Hiland to see an attorney. Trumble arranged a meeting with attorney Ed Edens. The three met at a restaurant, Hackney's, in Lake Zurich in 2002. Trumble would testify to certain inculpatory statements that Hiland made and would testify that Edens told Hiland that he should not come forward with his statement given that other arrests had been made.

¶ 123 After the offer of proof, Trumble resumed his testimony before the jury. Trumble testified that, a few days after the first conversation with Hiland, he had a second conversation with him about the shooting at a restaurant in Lake Zurich. This time, Hiland was sober and repeated the confession he had given at the apartment. He emphasized that Levand was the shooter. Hiland was upset.

¶ 124 During a third conversation, which occurred on the way home from the restaurant, Hiland told Trumble that, since someone else was arrested, he was not going to do anything. Trumble further testified that he never went to the police with the foregoing information.

¶ 125 15. Hiland's Confession to Gina Kollross

¶ 126 Gina Kollross testified that Hiland once lived with her and that he is her sister's (Charlene McCauley's, formerly Nicky Hiland's) brother. Kollross knew DeCicco and Levand. Kollross dated Andrew Hiland, Adam Hiland's brother, in 2001.

¶ 127 Kollross testified that Adam Hiland first spoke to her about the shooting a couple of days after it occurred and while they were in Vicki Brummett's basement. Andrew was also present. During a second conversation, one to two weeks after the shooting, in an apartment in Hebron, Hiland confessed to Kollross. He told her that the group had planned to go in and rob the restaurant,

but the owner chased him with a knife and then Levand shot him to free Hiland. Briseno "was going after his arm and his hand."

¶ 128 When Kollross saw Hiland in the days after the shooting, she noticed that his hand was wrapped up. He first stated that he fell down stairs, but later stated that he was cut with a knife during the shooting. Levand, DeCicco, and Hiland are drug users.

¶ 129 16. Hiland's Confession to Charlene Nicky McCauley

¶ 130 Charlene Nicky McCauley testified that she is Hiland's sister. In 2001, McCauley lived with Vicki and David Brummett (Vicki is her aunt, and DeCicco is her cousin). DeCicco, Levand, Hiland, and Schwartz also lived with the Brummetts. While living there, McCauley observed the DeCicco group pick the lock to and enter the Brummetts' bedroom. One day after the shooting, McCauley observed Hiland with bandages on his forearms. He explained that he slid on icy stairs at Ben DeCicco's house.

¶ 131 McCauley moved out of the Brummett house in the summer of 2001. Right before Christmas 2001, Hiland confessed to McCauley. He told McCauley that the DeCicco group was at DeCicco's father's house, smoking crack in the garage. They ran out of drugs and wanted to get more money. The group decided to rob the Burrito Express. Levand and Hiland went inside, and the owner started to chase after them. One of the men grabbed Hiland, they fought, and Levand shot him. After Hiland confessed to McCauley, he appeared depressed, ashamed, and relieved.

¶ 132 McCauley denied telling representatives of defendant that, after her conversation with Hiland, she gave him money. Hiland did not tell McCauley that he was cut during the shooting. She might have told the representatives that Hiland was cut during the shooting because she assumed that to be the case. McCauley never contacted the police.

¶ 133 17. State's Rebuttal - Roger Pechous

¶ 134 Roger Pechous testified that he was a detective with the McHenry police department in 2001. At that time, he had known DeCicco in his professional capacity for seven years. He denied ever going to the correctional facility in the middle of the night to interview her. Pechous also testified that he did not tell DeCicco that there was a detective Brown working for the "bad guys." He did not know a detective Brown and never told DeCicco that his department had arrested the wrong individuals. Finally, Pechous testified that he never told DeCicco not to speak to a detective Brown.

¶ 135 18. Russell (Rusty) Levand

¶ 136 Russell (Rusty) Levand testified that Patrick Anderson is an acquaintance and that they were both incarcerated in the McHenry County jail from June 6, through June 11, 2011. Levand was incarcerated for drug possession and burglary. (At the time of trial, he was on probation for theft and drug possession.) Levand denied that he confessed to Anderson and denied that he was at the Burrito Express on the night of the shooting. Levand dated DeCicco from when he was ages 14 to 17. He broke up with DeCicco on March 7, 2001. He met his wife, Wanda Levand, on March 10, 2001.

¶ 137 On cross-examination, Levand testified that, in 2003, he was convicted for aggravated battery in McHenry County. In 2004, he was convicted of obstructing justice; in 2005, he was convicted of possession of a controlled substance in Cook County; and in 2006, he was convicted of theft in McHenry. Levand denied that he "played" with the Brummett gun and denied that he was involved in the Burrito Express shooting, ever shooting a gun, or telling DeCicco that he was involved. Levand testified that he was at a hotel when DeCicco's car was stolen in June 2001. He did not have a conversation with Anderson about the car in the summer of 2011.

¶ 138 19. Susanne Dallas DeCicco

¶ 139 Susanne Dallas DeCicco, age 29, testified that she dated Levand for a few years. In 2002, DeCicco was convicted of obstructing justice and possession of a controlled substance; in 2004, she was convicted of theft; in 2005, of retail theft (twice) and obstructing justice; and she is currently incarcerated for unlawful possession of prescription medication.

¶ 140 DeCicco denied that Roger Pechous came to see her in the middle of the night while she was in a correctional facility. She told state police that he had done so. When initially asked why she told the story, she replied, "I don't have an answer for that. I can't make sense of a lot of things that I said." When asked again about her statements to state police, DeCicco stated that she was in the Department of Corrections and "they then came to see me and knowing that I had lied to the Quincy Police Department, I feared further charges before I was released from prison at the time. It just somehow made sense to me that if I just lied a little longer, I'd be able to get out and deal with it later. *** I wanted to get out and I thought if I told them I lied, I would have got in more trouble."

¶ 141 Addressing McMullen, DeCicco stated that she has met her on two occasions, including at the Dwight correctional facility. DeCicco denied that she ever had a conversation with McMullen about the shooting. DeCicco followed the story in the news. She told her family that she was involved in the shooting because she is a heroin addict and her family gave her money for drugs. Initially, the story was "a joke" between DeCicco and her sister, Elizabeth Schwartz.

¶ 142 When questioned why she told personnel from the Quincy police department that she had knowledge of the Burrito Express shooting, DeCicco testified that "because when I said no, it wasn't a good enough answer and I was told that I would definitely be leaving that day if I basically said something different and I was ready to go home." One of the interrogators had called her the previous day and told her that she would be able to leave if she told the truth. DeCicco arrived with

her mother and boyfriend. The interview was on Saturday, November 19, 2005, and she wanted to be released before Thanksgiving the following Thursday. She confessed during the interview because she wanted to leave jail that day. She did not contemplate that confessing to a role in a murder could possibly involve additional incarceration time.

¶ 143 DeCicco denied that she read police reports in this case. She acknowledged testifying in 2008, but testified that she could not recall if she stated at that time that she had reviewed police reports. On the day of the shooting, DeCicco was in the process of moving from her biological father's, Ben DeCicco's, house to her mother's, Vicki Brummett's, house. She visited her sister in the hospital. Levand and Hiland were there. They left for about one hour to retrieve Schwartz's maternity bag. They returned, and DeCicco then left with them. They drove to Ben DeCicco's house, which is around the corner from the Burrito Express. Hiland and Levand were helping DeCicco move. DeCicco denied (but also stated that she did not remember) that she saw a blue towel in the trunk of her car when Hiland and Levand were standing by it. (She could not recall if she had testified in 2008 that she saw it.) She knew that David Brummett kept a gun in his closet wrapped in a blue towel.

¶ 144 In June 2001, DeCicco attended a party for her brother at a hotel in Gurnee. Her brother drove DeCicco in his car. Hiland and Levand came to the party in DeCicco's car. When she woke the next morning, DeCicco noticed that her car was gone. She contacted the police and later learned that her car was burned.

¶ 145 20. Adam Hiland

¶ 146 Adam Hiland testified that he is currently in custody for fleeing and eluding (out of Wisconsin). He has been convicted of attempted burglary, possession of a controlled substance

(twice in 2004), aggravated fleeing of police in 2005, aggravated battery in 2008 and 2011, and fleeing or eluding an officer (in 2011). Hiland denied that he has ever been cut with a knife on his hands or arms. (The State had Hiland show his hands and arms to the jury.) Hiland testified that he does have a scar on his hand from when he was tased on his most recent fleeing and eluding case; he "hit the pavement and it knocked a chunk of skin out of my hand." The police tased him because he was running. Hiland denied that he told his cousin Elizabeth Schwartz that he got the scar by grabbing a knife at the Burrito Express.

¶ 147 21. Verdict and Sentence

¶ 148 On February 29, 2012, the jury returned a guilty verdict on all counts and found that defendant personally discharged the firearm that killed Briseno. On April 26, 2012, the trial court sentenced defendant to 67 years' imprisonment for first-degree murder[6] and a concurrent sentence of 7 years' imprisonment for attempt armed robbery. On May 9, 2012, the trial court denied defendant's motion to reconsider the sentence. Defendant appeals.

¶ 149 II. ANALYSIS

¶ 150 A. Motion Taken with the Case

¶ 151 Preliminarily, we address the State's motion, taken with the case, to strike defendant's statement of facts and order defendant to submit a new statement of facts in compliance with Illinois Supreme Court Rule 341(h)(6) (eff. July 1, 2008). The State argues that defendant's statement of

[6]The court found that the two first-degree murder convictions merged and specified that the 67-year total sentence was comprised of 42 years for the murder conviction (on a sentencing range of 20 to 60 years) with a 25-year firearm enhancement.

facts is "permeated" by argumentative statements and comments, including a hypothetical that he asks this court to consider. Defendant responds that, with one exception, none of the statements about which the State complains will hinder our review of the case and requests that we deny the motion to avoid needless delay. Rule 341(h)(6) provides that an appellant's brief include a statement containing "the facts necessary to an understanding of the case, stated accurately and fairly without argument or comment." The court has discretion to strike an appellate brief. *People v. Thomas*, 364 Ill. App. 3d 91, 97 (2006). Generally, a reviewing court will not strike portions of a party's brief unless it includes such flagrant improprieties that it hinders our review of the issues. *Id.* Our review of defendant's statement of facts and the record indicates that it contains impermissible argument; however, they do not hinder our review of the case. We decline the State's request to strike defendant's statement of facts, but we will disregard any inappropriate or argumentative statements, including the hypothetical. See *Jane Doe-3 v. McLean County Unit District No. 5 Board of Directors*, 2012 IL 112479, ¶10 fn. 4.

¶ 152 B. Sufficiency of the Evidence

¶ 153 Defendant argues that the evidence was insufficient to sustain his convictions. Defendant argues that the evidence reflected that: he made no incriminating statement; there was no physical evidence (*i.e.*, gun, fingerprints, DNA, or blood) connecting him to the crimes; there was no eyewitness testimony that he was involved or live sworn testimony from any purported accomplice linking defendant to the crimes; and the only incriminating evidence was Houghtaling's prior inconsistent statements (admitted as substantive evidence), and recanted on the stand. Defendant contends that the State's case rested entirely on Houghtaling's uncorroborated and unreliable prior statements and was simply insufficient to convince a reasonable juror beyond a reasonable doubt.

Defendant also asserts that the physical and circumstantial evidence and eyewitness testimony not only was insufficient to convict, but also cut against the State. Further, when the case against the DeCicco group is considered, no reasonable trier of fact, defendant argues, could have convicted him. For the following reasons, we reject defendant's argument.

¶ 154 In reviewing the sufficiency of the evidence in a criminal case, our inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the offense beyond a reasonable doubt. *People v. Davison*, 233 Ill. 2d 30, 43 (2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). Under this standard, all reasonable inferences from the evidence must be allowed in favor of the State. *People v. Martin*, 2011 IL 109102, ¶ 15.

¶ 155 Here, the State was required to prove as to first-degree murder that defendant killed Briseno while attempting or committing armed robbery. The armed robbery statute (720 ILCS 5/18-2 (West 2002)) provides that a person "commits armed robbery when he or she violates Section 18-1 while he or she carries on or about his or her person, or is otherwise armed with a dangerous weapon." The robbery statute provides that "[a] person commits robbery when he takes property from the person or presence of another by the use of force or by threatening the imminent use of force." 720 ILCS 5/18-1 (West 2002). Finally, a "person commits an attempt when, with intent to commit a specific offense, he does any act which constitutes a substantial step toward the commission of that offense." 720 ILCS 5/8-4(a) (West 2002).

¶ 156 We conclude that the evidence was sufficient in this case to convict defendant. The jury heard that Houghtaling pleaded guilty to participating in the shooting at the Burrito Express. Further, the jury heard Houghtaling's prior statements—the Omaha interview (which, significantly, was

conducted before any plea deal), his testimony at McMullen's trial, and his direct testimony at defendant's second trial—incriminating defendant, which were the strongest evidence against defendant and sufficiently corroborated Pardo's (the only eyewitness's) testimony of the events. This evidence, along with the additional evidence presented against defendant and his group, was such that any rational trier of fact could have found beyond a reasonable doubt that defendant committed the crimes.

¶ 157 Houghtaling testified that he pleaded guilty to the crime in November 2001, about eight months after it occurred, was represented by an attorney, and he agreed to testify truthfully against defendant, McMullen, and Collett in exchange for receiving a 20-year sentence. In his Omaha statement, which, again, was conducted before the plea deal, Houghtaling stated, without suggestion, that defendant carried a "little .22," which was consistent with the type of gun the police believed was used in the shooting, and he stated that his jacket was green, which was consistent with Pardo's testimony. On redirect examination at defendant's second trial, Houghtaling acknowledged that he did not have any police reports at the time of the Omaha interview. Further, as the State notes, the sketch of the man wearing the green jacket that was prepared from Pardo's statements bears a striking resemblance to Houghtaling and does not bear a strong resemblance to Hiland.

¶ 158 Defendant himself, according to police detectives, gave conflicting statements about his relationship with Houghtaling. According to Detective John Jones, defendant stated on May 12, 2001, that he was with Collett and McMullen on the night of the shooting; however, when asked if he was also with Houghtaling, defendant did not acknowledge or deny it, but stated that he did not know Houghtaling. This was contradicted by Houghtaling (even in his direct testimony), Collett, and Weisenberger, who testified they were with defendant and Houghtaling on the night of the

shooting. Further, defendant himself contradicted this statement when he spoke to Detective Jeff Rhode, who testified that defendant stated on the day after the shooting that he was with Houghtaling (and the rest of his group) the prior evening.

¶ 159 As to Collett, although he denied involvement in the crime, the jury could have found this incredible and instead found significant his apology to Briseno's widow and inferred that he had remorse for committing the crime with his group. Also, notably, the jury could have placed significant weight on the fact that Collett pleaded guilty to attempt armed robbery and discounted his explanation that it was merely "a plea of convenience." The jury heard that Collett had initially told police that he heard gunshots from the area of the restaurant. (The jury also heard that McMullen was convicted for her participation (with defendant and his group) in the crime.)

¶ 160 We disagree with defendant's argument that Houghtaling's prior inconsistent statements were insufficiently trustworthy to sustain his convictions. Houghtaling's prior statements implicating defendant and his group in the shooting were consistent with each other and corroborative of Pardo's testimony. Houghtaling stated twice (in Omaha and at McMullen's trial) that defendant entered the restaurant first and carried the gun; this was consistent with Pardo's testimony that the man with the gun entered first and the man in the green jacket followed him. Houghtaling also stated in three statements (albeit, the first time in Omaha, in response to a leading question) that he and defendant concealed their faces and twice stated (at defendant's second trial and McMullen's trial) that they wore ski masks. This was consistent with Pardo's testimony that the men wore masks covering all but their eyes. Houghtaling also testified three times that defendant announced the robbery after he and Hougtaling entered the Burrito Express; this was consistent with Pardo's statement that the man with the gun stated something in English to Briseno, which resulted in Briseno raising his knife and

chasing them out of the restaurant. (Houghtaling also related the chase in his statements.) During the Omaha interview, Houghtaling was asked whether he ran toward the busy street or the side street and he responded, without suggestion, that he ran toward the side street. This was consistent with Pardo's testimony that he chased Houghtaling across Third Street. At both McMullen's trial and defendant's second trial, Houghtaling testified that he fell on ice and one of the men caught him. This testimony was consistent with Pardo's statement that the man in the green jacket fell on ice. Pardo, further, was asked about the green jacket that Hougtaling wore on the night of the shooting and stated that it looked like the one the man involved in the crime had worn. Houghtaling also related in three statements that he was caught while defendant was outside his view and that defendant later arrived/came into view and fired shots. Pardo similarly testified that he ran in front of a nearby dry cleaners and that Briseno ran behind it and, at one point, he could see only the man in the green jacket, with whom he caught up after the man slipped and fell on ice. Pardo testified that he did not again see the man with the gun until he had reached Third Street (while he was dragging the man in the green jacket).

¶ 161 We reject defendant's argument that Hougtaling's Omaha confession was given while he was under the influence of drugs and, thus, was inherently unreliable. The jury heard Detective Brogan testify that Houghtaling showed no signs of being under the influence of drugs or alcohol. It was the jury's function to weigh the witnesses' credibility, and, viewing the evidence in the light most favorable to the State, we cannot quarrel with its resolution.

¶ 162 Pardo's failure to identify defendant or Hougtaling from the photo array was known to the jurors, as was the fact that the sketch prepared of defendant from Pardo's description did not show facial hair (defendant's booking photo, taken within days of the shooting, showed that he had facial

hair). The jury weighed this evidence, and the jurors were aware that it was dark out during the shooting and that defendant's face was visible only when he was about 25 to 30 feet away from Pardo.

¶ 163 We reject defendant's argument that Houghtaling's statements were inherently unbelievable (because: (1) they were inconsistent; (2) he was an alleged accomplice who received a plea deal and thus had a motive to lie; and (3) his testimony was the only evidence inculpating defendant). A conviction supported by a prior inconsistent statement admitted as substantive evidence may be upheld, even though the witness recants the prior statement at trial. *People v. McCarter*, 2011 IL App (1st) 092864, ¶ 23; 725 ILCS 5/115-10.1 (West 2012); see also *People v. Island*, 385 Ill. App. 3d 316, 347 (2008) (a recanted prior inconsistent statement admitted pursuant to section 115-10.1 can support a conviction even in the absence of other corroborative evidence). "The trier of fact may consider a prior inconsistent statement introduced as substantive evidence under section 115-10.1 the same as direct testimony by that witness. The trier of fact is free to accord any weight to such properly admitted statements based on the same factors it considers in assessing direct testimony." *McCarter*, 2011 IL App (1st) 092864, ¶ 23. "Once a jury or trial court has chosen to return a guilty verdict based upon a prior inconsistent statement, a reviewing court not only is under no obligation to determine whether the declarant's testimony was 'substantially corroborated' or 'clear and convincing,' but it may *not* engage in any such analysis." (Internal quotation marks omitted.) (Emphasis in original.) *People v. Morrow*, 303 Ill. App. 3d 671, 677 (1999) (quoting *People v. Curtis*, 296 Ill. App. 3d 991, 999 (1998)). Here, any inconsistencies in Houghtaling's testimony or statements were before the jury and did not render his testimony inherently unreliable, but merely

affected the weight to be given to the testimony, which was the jury's role to assess. We cannot conclude that any inconsistencies cast doubt on the jury's verdict.

¶ 164 We also reject defendant's argument that the physical and circumstantial evidence (other than Houghtaling's statements) did not support a conviction. Defendant contends that there was no physical evidence linking defendant to the crime, arguing that the crime scene was bloody, but that neither defendant nor Houghtaling had blood on their clothes that night or the next day. Nor did McMullen's car have blood stains, and neither defendant nor Houghtaling showed signs of injury.

¶ 165 Defendant's characterization of the crime scene as bloody is not supported by the evidence, where the only testimony on that point concerned Briseno coughing up blood after being shot. At this point, according to Pardo, Briseno was using Houghtaling as a shield, but held him at arm's length and moved one-half step to the left and then one-half step to the right. Further, Pardo did not testify that he saw blood on the man with the green jacket, and there was no testimony that the shooter was close to Briseno after he coughed up blood. As to McMullen's car, it was not recovered until more than two months after the shooting, which provided sufficient time to clean or destroy any physical evidence. Also, the lack of physical injuries to Houghtaling do not cast doubt on his credibility, where it was undisputed that the green leather jacket he wore covered his arms. Finally, we also reject defendant's argument that it was unbelievable that, after the shooting, Collett walked into Cloud 9. His actions are consistent with providing an alibi for the group. Further, we note that Houghtaling told police in Omaha, without suggestion, that only Collett went inside Cloud 9.

¶ 166 As to defendant's theory that the DeCicco group committed the crime, we reject defendant's argument that he presented compelling evidence of that group's culpability that overwhelmed the State's case against him. Although DeCicco knew two facts that were not made public—*i.e.*, that

Briseno was hit in the head with a gun and that he shouted into a passing car—we disagree that the evidence against the DeCicco group was far stronger than that against defendant. DeCicco's confessions to police, which were central to defendant's case, were fraught with significant inconsistencies. She told police in 2005 in Quincy that she saw the Brummett gun when Levand and Hiland were going through her car trunk (and before she drove and found them at the Burrito Express). However, in 2006, she told police that she did not see the gun until later while near the restaurant: when the men entered the restaurant and when Levand ran toward her car. DeCicco's recollection of the date of her group's alleged involvement in the shooting was incorrect, because she stated that it occurred on the date of her niece's birth, which was March 5, 2001, whereas the shooting took place on March 6, 2001.

¶ 167 DeCicco also told police in Quincy that Detective Pechous had come to her jail cell in the middle of the night to tell her that another officer was trying to help defendant and that Pechous knew that her group was guilty. This statement was contradicted by Pechous, who had prepared a report of his conversation with DeCicco, wherein he reported that he did not meet with her at night and that he visited her twice. (When confronted with this, DeCicco stated that, "It's been a while.") Also, Sergeant Schroeder testified that state police investigated the allegations and that there were no findings of malfeasance by the McHenry police department. DeCicco also told police that Briseno threw a knife at the two men after they entered the restaurant, but no knife was ever recovered from the floor and Pardo did not mention this in his testimony; a knife was recovered near Briseno's body. Further, DeCicco's description of the mens' facial coverings were not consistent with Pardo's description that both men wore masks: DeCicco stated first in 2006 that both Levand

and Hiland wore masks; however, she later stated that Hiland cleaned blood off of his face and that he had worn a scarf. (She also testified that both men were covered in blood.)

¶ 168 The jury also heard that DeCicco used drugs (like Houghtaling and defendant) and, further, that she lied to obtain money for drugs. DeCicco testified that, when she spoke to state police in 2006, she confessed to being involved in the shooting because she could get "out on the streets faster" so she could buy drugs. Also in 2006, she first stated that she had not read the confessions in the case and then stated she had (before catching herself): "Me too and I've also, or I haven't seen." She then explained that she had read newspaper accounts and not read the actual confessions. DeCicco's testimony concerning Hiland cutting his hand with the knife is also suspect because the DNA recovered from the knife belonged only to Briseno.

¶ 169 As to DeCicco's statement that Briseno shouted out something at her while she was allegedly in her car and leaving the scene, the details that she related about the incident cast doubt on her involvement. DeCicco stated in 2005 to police that she followed Levand and Hiland after they started walking to the Burrito Express; she was in her car. She saw them run into the restaurant and DeCicco started to pull away in her car. However, "all four of them *** darted across the street in front of me. One of the Hispanic men turned around and yelled something in my car. I just kept driving." However, Pardo did not testify that the four men ran as a group across the street. He stated that, after the two men ran out of the restaurant, he ran in one direction in front of the cleaners and Briseno ran behind the cleaners. Pardo lost sight of the two men after they crossed Third Street and ran near a house. At one point, as Briseno and Pardo followed the men, Pardo saw Briseno stop and talk to someone in a car. Thus, he did not state that all four men ran across the street at the same

time in a group. Further, Pardo testified that he did not see defendant outside until defendant approached from about 25 to 30 feet away and after Pardo had caught the man in the green jacket.

¶ 170 As to the Brummett gun (a .22-caliber revolver with six lands and grooves), although McIntyre could not identify it as having fired the bullet that killed Briseno, she could not exclude it. However, she stated that a .22-caliber gun is a very common type of gun, as are six lands and grooves. DeCicco's statement that Briseno was pistol-whipped was consistent with what the detectives believed occurred during the shooting and was information that was not released to the public. However, Pardo never testified that he witnessed the shooter strike Briseno with his gun and Dr. Blum, the pathologist, concluded only that the laceration of Briseno's head was caused by contact with a *blunt object* and that this was *consistent* with being pistol-whipped with the barrel of a gun; however, he made no determination as to the *timing* of the wound. Finally, DeCicco told state police during her 2006 interview not only that Briseno was hit in the head with a gun, but also that this information " 'was not in the papers anywhere. How would I know that unless the people who did it actually told me?' " The fact that DeCicco stated that the pistol-whipping was not in the papers could reflect merely that she read new reports of the crime or reflect that this non-public information was not kept as secret from the public as the police desired. It was the jury's function to assess this testimony, and we cannot conclude, given the foregoing, that her testimony render's Houghtaling's testimony inherently unreliable.

¶ 171 Finally, as to the DeCicco group's confessions to third parties, the jury heard that testimony, including that several witnesses had prior convictions involving deceit (Anderson, Schwartz, and Trumble) and that several of the alleged confessions occurred long after the shooting (Hiland's confession to Anderson; DeCicco's confession to Rexford; and Hiland's confession to Trumble).

It was the jury's function to assess the witnesses' credibility. It found Houghtaling's prior statements credible and the DeCicco group's confessions incredible. We also reject defendant's contention that Hiland's repeated confessions raised a reasonable doubt about the State's case, including because they contained details that explained the gaps in the State's case against defendant. Defendant focuses on the scrapes and bruises the witnesses observed on Hiland in the days following the shooting. Pardo's description of the shooting does not necessarily lead to the conclusion that the man in the green jacket sustained such injuries. Further, the witnesses also testified that Hiland offered an alternative explanation for his injuries: he had slipped and fallen on icy stairs at Benjamin DeCicco's house.

¶ 172 A trier of fact is not required to accept any possible explanation compatible with a defendant's innocence and elevate it to the status of reasonable doubt (*People v. Siguenza-Brito*, 235 Ill. 2d 213, 229 (2009)), or to accept a defendant's version of events from competing versions of events (*People v. Villarreal*, 198 Ill. 2d 209, 231 (2001)). Here, the jury was presented with two versions of the events and, given its verdict, it found the State's version persuasive. The State's evidence, most notably Houghtaling's prior statements, was not so unreasonable, improbable, or unsatisfactory that it raised a reasonable doubt as to defendant's guilt. In summary, the evidence was sufficient to sustain defendant's convictions.

¶ 173 C. Evidentiary Rulings

¶ 174 Next, defendant challenges the trial court's evidentiary rulings, arguing that the court actions denied him his federal and state constitutional due process right to a fair trial and that the court abused its discretion. He argues that the court excluded competent and admissible evidence relevant

to his defense and erred in ruling on the admissibility of certain other evidence. For the following reasons, we reject defendant's arguments.

¶ 175 "A criminal defendant, whether guilty or innocent, is entitled to a fair, orderly, and impartial trial" conducted according to law. *People v. Bull*, 185 Ill. 2d 179, 214 (1998). This due process right is guaranteed by the federal and state constitutions. *Id.* at 214; U.S. Const., amend. XIV, § 1; Ill. Const.1970, art. I, § 2; see also *People v. Peeples*, 155 Ill. 2d 422, 480 (1993).

¶ 176 Generally, evidentiary rulings are reviewed for an abuse of discretion. *People v. Patrick*, 233 Ill. 2d 62, 68 (2009). A court abuses its discretion where its ruling is arbitrary, fanciful, or unreasonable. *Id.* " 'Moreover, even where an abuse of discretion has occurred, it will not warrant reversal of the judgment unless the record indicates the existence of substantial prejudice affecting the outcome of the trial. [Citation.]' " *People v. Jackson*, 232 Ill. 2d 246, 265 (2009) (quoting *In re Leona W.*, 228 Ill. 2d 439, 460 (2008)).

¶ 177 1. Exclusion of DeCicco Group's Motive/Anderson's Testimony

¶ 178 First, defendant argues that the trial court erred in excluding Patrick Anderson's testimony, which demonstrated that the DeCicco group had a motive to rob and ultimately kill Briseno. He notes that the jury heard testimony from multiple witnesses that Hiland confessed that the motive for the robbery was to obtain cocaine and drug money because he and Levand were drug users who ran out of drugs. The excluded evidence, defendant urges, corroborated this testimony: Briseno was a drug dealer who often had drugs and cash at his restaurant, and, one week before Briseno's death, Levand (the shooter) learned that there were often drugs and cash at the Burrito Express.

¶ 179 To be admissible, evidence must be relevant, meaning that it is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action

more probable or less probable than it would be without the evidence." Ill. R. Evid. 401 (eff. Jan. 1, 2011); see also *People v. Kirchner*, 194 Ill. 2d 502, 539 (2000); *People v. Cruz*, 162 Ill. 2d 314, 348 (1994) (generally, "all relevant evidence is admissible unless otherwise provided by law"). However, "a court may generally exclude relevant evidence if its probative value is outweighed by such dangers as unfair prejudice, jury confusion, or delay." *Id.* Further, evidence may be excluded as irrelevant where it is remote, uncertain, or speculative. *People v. Ursery*, 364 Ill. App. 3d 680, 686 (2006).

¶ 180 Anderson came forward with the evidence in 2011, when he wrote a letter to defense counsel, stating that he purchased drugs from Briseno and sold them to Levand, whom he took to the restaurant one week before the shooting. The trial court excluded Anderson's testimony, finding that it contained numerous hearsay statements; that it was "highly suspect" given that Anderson came forward 10 years after the shooting; and that the testimony did not establish a motive for the DeCicco group to commit the crime because there was no close connection to the drugs and the shooting. (The court allowed Anderson's testimony concerning Levand's confession to him while they were incarcerated. During his testimony, Levand denied that he confessed to Anderson.)

¶ 181 As to the court's finding that the motive evidence was not closely connected to the crime, defendant contends that Anderson would have testified from personal knowledge that Levand purchased drugs sold by Briseno shortly before the shooting and that Levand was aware that Briseno sold drugs from the restaurant and kept large quantities of drugs there. He asserts that this evidence, combined with evidence the jury heard—namely, about the DeCicco group's drug use and need for drugs on the night at issue, that the robbers walked past the cash register and into the rear of the restaurant, and that the DeCicco group's version of the events matched the facts much better than

Houghtaling's version—the excluded evidence made the DeCicco group's guilt more likely and the State's version of the events less credible. Defendant further argues that Anderson's testimony that Levand knew Briseno had drugs and money at the restaurant was essential to the jury's weighing of the competing theories.

¶ 182 Defendant relies on *People v. Neely*, 184 Ill. App. 3d 1097 (1989). In that case, the defendant was convicted of robbery, intimidation, and aggravated battery. Prior to trial, the trial court granted the State's motion to exclude evidence of an alleged cocaine delivery by the victim to the defendant's co-defendant on the evening of the alleged offenses. At trial, the victim testified that he met the co-defendant at a tavern and later drove with another individual to pick up the defendant at a low income housing unit. They drove to the other man's trailer, where they played music and drank beer. Later, they returned to the housing unit where they had picked up the defendant, and the defendant approached the victim from behind and hit him on the back of the head, kicked him in the face, and stepped on his forehead. After kicking him again, the defendant took $20 from the victim's pocket and stole his wallet. The defendant and co-defendant then blindfolded the victim and drove him to the countryside and left him. The co-defendant, who had pleaded guilty to aggravated battery and who was the defendant's cousin, testified for the defense that he had beaten the victim because, earlier in the evening, the victim had sold him something that the co-defendant did not believe was worth the $20 he had paid for it.

¶ 183 On appeal, the court held that the trial court erred in excluding the evidence of the drug delivery. *Id.* at 1110. The court determined that the evidence "lent credibility" to the co-defendant's testimony that he, rather than the defendant, attacked the victim. *Id.* "Though there was evidence that [the victim] had cheated [the co-defendant] in the sale of something, the jury was left wondering

why [the co-defendant] would react so violently to having been cheated." *Id.* The appellate court concluded that the exclusion of the evidence made the co-defendant's account less credible and, thus, offended the principle that a defendant "is entitled to all reasonable opportunities to present evidence which might tend to create doubt as to his guilt." *Id.*

¶ 184 Here, defendant argues that, like *Neely*, the proposed evidence would have supported defendant's other evidence pointing directly to the DeCicco group's guilt and away from his own. Anderson would have testified from personal knowledge that Levand purchased drugs sold by Briseno shortly before the shooting and that Levand was aware Briseno sold drugs from the restaurant and kept large quantities of drugs there.

¶ 185 The State responds that this court can affirm on any basis supported by the record and raises two arguments. First, it argues that Anderson's testimony was properly excluded because it was speculative (and, thus, irrelevant) and likely to confuse the jury by suggesting that the robbery was related to a drug business. The State contends that, assuming that defendant's offer of proof showed that Levand knew that large amounts of cash and drugs were at times present at the restaurant, that evidence is irrelevant to show that the DeCicco group had a motive to commit the charged crimes. It urges that the issue is not whether the DeCicco group robbed the Burrito Express, as opposed to some other establishment on the date at issue, but whether they committed the charged armed robbery and murder. The State further asserts that the fact that a person may know that a retail establishment that is open for business has a large amount of cash on the premises does not, in itself, provide a motive for someone to attempt to rob the store.

¶ 186 As to *Neely*, the State responds that here, in contrast, the excluded evidence would not have made it more likely that Hiland and Levand would determine that they were going out to commit a

robbery simply because they knew that a large sum of cash might be present at a particular establishment. In *Neely*, the State asserts, the co-defendant's anger and need for vengeance explained his actions, which formed the charged crime. Here, similar evidence would be that which was already admitted: Hiland's explanation that he and Levand decided to go somewhere to commit a robbery for money because they ran out of drugs and wanted to buy more. That was the motive evidence, according to the State, and it was admitted at trial. The excluded evidence, it urges, did not show motive and, so, was not relevant. The State adds that the evidence was also not proper to bolster the truth of the matter asserted in the declarations against interest by Hiland and Levand (that they committed the robbery and murder) because it is a mere embellishment, not objective indicia of trustworthiness, by the witness who is testifying that a declaration against interest was made.

¶ 187 Second, the State argues that the *live* offer of proof reflected only that Anderson would have testified that Levand was present when Anderson tried to buy drugs from someone named "Serge" at the Burrito Express or in its parking lot. The State suggests that it is "a leap" from knowing those facts to believing that drugs and a large amount of money were stored at the restaurant (as was related in Anderson's *letter*). It further notes that there was no evidence that the crime was committed to steal drugs and, thus, evidence concerning whether there were drugs, as opposed to money and drugs, on the premises was not relevant. The State also points out that the offer of proof did not show that Briseno was present for and involved in a drug transaction one week before his death.

¶ 188 Finally, the State argues that, even if Anderson's letter is considered (in conjunction with the live offer of proof) part of defendant's offer of proof,[7] the trial court's exclusion of the evidence was not an abuse of its discretion because the proposed evidence was not specific. According to the State, even considering that Anderson could have testified that he told Levand that large sums of money and drugs could be found on the premises at times, the statement does not contain details as to a specific amount or range of money reasonably expected to be present and it did not give a specific time or day when the money and drugs would be there. The "jurors would be allowed to speculate that, without any knowledge of the times or days that an unknown quantity of cash or drugs could be found, it was very likely that Hiland and Levand would rob the Burrito Express and so the fact that it was robbed shows that Levand and Hiland committed the crime."

¶ 189 We conclude that the trial court did not abuse its discretion in excluding the motive evidence. It was not unreasonable to exclude the evidence on the bases that it was not entirely consistent with the admitted evidence (and thus did not entirely bolster that testimony) and that it would have confused the jury as to the proper focus of the trial (*i.e.*, the murder, as opposed to Briseno's alleged drug-dealing). As to consistency, the evidence *admitted* at trial (specifically, McCauley's and DeCicco's testimony) reflected that the DeCicco group had been doing drugs on the day of the

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[7]The State cites no authority for the proposition that only the live testimony constitutes defendant's offer of proof. Indeed, this approach has been criticized as "unduly strict," as offers of proof are not even required where the court is apprised of the nature and character of the evidence that is sought to be introduced. See Michael H. Graham, Handbook of Illinois Evidence § 103.7, at 37-39 (10th ed. 2010).

shooting, ran out of drugs, and allegedly decided to go out and commit a crime to obtain cash so that they could purchase more drugs. McCauley testified that, during his confession to her, Hiland stated that the DeCicco group ran out of drugs and wanted more money and decided to rob the Burrito Express. DeCicco, however, stated during her Quincy interview that she overheard Levand and Hiland discuss stealing purses or robbing someone to get money. The proffered testimony—*i.e.*, that Levand knew that Briseno kept drugs and money at the restaurant and, as a result, decided with his group to rob it—was not entirely consistent with the admitted testimony.

¶ 190 As to relevance, the possible presence of drugs, "at times," in the restaurant or on Briseno is not directly relevant because the admitted testimony reflected that the DeCicco group allegedly decided to go out to commit a crime to obtain *cash* (so that they could purchase drugs). It did not reflect that they decided to commit a crime to obtain both cash and drugs. Anderson's testimony as to the presence of drugs was, therefore, not relevant. We further note that defendant also sought to admit the testimony of Quinones, who would have testified that he worked as an undercover operative in a drug investigation in August and September 2000 and that he spoke to Briseno, who offered to, and did, sell him drugs. He also sought to admit the testimony of Solarz, who would have testified that he searched the Burrito Express on March 7, 2001, using a K-9 handler and narcotic-sniffing dog, who indicated the possible presence of narcotics inside the restaurant. We conclude that it would not have been unreasonable to exclude this testimony on the basis that it would have confused the jury by directing its attention to Briseno's drug-dealing, and was not relevant to the DeCicco group's alleged plan to rob someone or some establishment to obtain money to purchase drugs.

¶ 191 We further disagree with defendant that *Neely* supports his argument. The *Neely* court explained that the evidence should have been admitted to explain the *degree* of the co-defendant's reaction to the transaction, thus, lending credibility to his testimony. *Neely*, 184 Ill. App. 3d at 1110. Here, in contrast, the admitted evidence was that the DeCicco group had been doing drugs on the day of the shooting, ran out of drugs, and allegedly decided to go out and commit a crime to obtain cash so that the group could purchase more drugs. Anderson's statement in his letter to defense counsel that he told Levand that Briseno was known to keep large amounts of cash at his restaurant "at times" does not explain the *degree* of Hiland's and Levand's actions.

¶ 192 Alternatively, even if it was error to exclude the testimony, we conclude that the record does not reflect that the error substantially prejudiced defendant such that it affected the outcome of the trial. The "State must prove beyond a reasonable doubt that the jury verdict would have been the same absent the error." *People v. Thurow*, 203 Ill. 2d 352, 363 (2003). When deciding whether error is harmless, a reviewing court may: (1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence. *In re Rolandis G.*, 232 Ill. 2d 13, 43 (2008). As to cumulative evidence, generally, where the admitted evidence is an adequate substitute for the excluded evidence or if such evidence adequately compensates for the excluded evidence, any error should be deemed harmless. *People v. Booker*, 274 Ill. App. 3d 169, 174 (1995). We reject defendant's claim that Anderson's testimony was of a different kind and character than that admitted at trial in that it directly corroborated one confession and, thus, "very likely" would have affected the outcome of the trial. The evidence was circumstantial, not direct as defendant

suggests, and cumulative to the direct evidence admitted at trial. Other witnesses testified that the DeCicco group attempted to rob the Burrito Express. Specifically, Tyda, Rexford, and Vicki Brummett testified that DeCicco confessed to them, and Trumble, Kollross, McCauley and Schwartz testified that Hiland confessed to them. Further, Anderson was allowed to testify that Levand confessed to him while they were both in jail. In contrast to this direct testimony (see, *e.g.*, *People v. Spencer*, 27 Ill. 2d 320, 326 (1963) ("as opposed to the circumstantial evidence relied upon by defendant, there is the factor that his confession was direct evidence of his guilt, [citation] which, in itself, overcomes the circumstantial theories relied upon by defendant and affords proof of his guilt beyond a reasonable doubt.")), Anderson's (excluded) testimony concerning the presence "at times" of drugs and money at the restaurant was circumstantial evidence linking the DeCicco group to the crime and was cumulative to the evidence concerning the DeCicco group members' confessions. Accordingly, we cannot conclude that, if it was erroneously excluded, the exclusion of this testimony substantially prejudiced defendant such that it affected the outcome of the trial.

¶ 193 2. Exclusion of Trumble's Testimony That He Took Hiland to an Attorney

¶ 194 Next, defendant argues that, although the trial court permitted Trumble's testimony that Hiland confessed in the presence of another person, the court erred in refusing to permit "the key foundational fact that Edens was a lawyer from whom Hiland was seeking advice." According to defendant, because the jury was deciding between the reliability of various confessions, the exclusion of evidence making a confession more reliable was highly prejudicial error. For the following reasons, we disagree.

¶ 195 The testimony that was allowed at trial was as follows. Trumble was allowed to testify that he had three conversations with Hiland wherein Hiland confessed. Trumble, who has a conviction

related to writing bad checks, related the details of the crime that Hiland provided to him. Also, the jury heard DeCicco's testimony that Hiland told her that he saw an attorney because "they thought—after they took, after they took the weapon, everybody thought we were going to jail."

¶ 196 An extrajudicial declaration not under oath, by the declarant, that he or she, and not the defendant on trial, committed the crime is inadmissible as hearsay, even though the declaration is against the declarant's penal interest. *People v. House*, 141 Ill. 2d 323, 389-90 (1990); *People v. Bowel*, 111 Ill. 2d 58, 66 (1986). Such a declaration may, however, be admitted where justice requires. *House*, 141 Ill. 2d at 390; *Bowel*, 111 Ill. 2d at 66. Thus, where there are sufficient indicia of trustworthiness of such extrajudicial statements, a declaration may be admissible under the statements-against-penal-interest exception to the hearsay rule. *Bowel*, 111 Ill. 2d at 66. In *Chambers v. Mississippi*, 410 U.S. 284, 300-01 (1973), the Supreme Court held that a declaration against penal interest is admissible where there is sufficient indicia of trustworthiness in that: (1) the statement was made spontaneously to a close acquaintance shortly after the crime occurred; (2) the statement was corroborated by other evidence; (3) the statement was self-incriminating and against the declarant's interest; and (4) there was adequate opportunity for cross-examination of the declarant. The presence of all four factors is not a condition of admissibility. "They are indicia, not hard and fast requirements." *House*, 141 Ill. 2d at 390. The question to be considered in deciding the admissibility of such an extrajudicial declaration is whether it was made under circumstances which provide " 'considerable assurance' " of its reliability by objective indicia of trustworthiness. *Bowel*, 111 Ill. 2d at 67 (quoting *Chambers*, 410 U.S. at 300-01). "A statement made to a law[-]enforcement officer may be made in an attempt to curry favor and obtain a reduced sentence; it may also be the product of coercion or force and be involuntary. Such a statement might not be

as reliable as a statement made to a good friend or [a] family member." *Tenney*, 205 Ill. 2d at 438-39. However, statements made to police officers in response to structured questioning may be more reliable than casual statements supposedly made to acquaintances. Statements to police officers while in custody have been admitted in a number of cases. See, *e.g.*, *People v. Human*, 331 Ill. App. 3d 809, 817 (2002); *People v. Kokoraleis*, 149 Ill. App. 3d 1000, 1020-21 (1986) (statements to an assistant State's Attorney and police officers while in custody more likely than not were trustworthy despite unavailability of declarants; "neither declarant stood to benefit by disclosing his role in the offenses").

¶ 197 In *Human*, upon which defendant relies, the defendant challenged the trial court's exclusion of a third-party confession. The appellate court reversed, holding that the circumstances under which the third-party confessed, coupled with the self-incriminating nature of his statements, made his confession reliable. *Id.* at 818. The third-party: (1) was accompanied to the courthouse by his parents and his attorney and confessed in the presence of an assistant State's Attorney and police officers; (2) his confession was corroborated by other evidence at trial (that left open the possibility that he was the shooter); and (3) the third-party did not stand to benefit from his statements because they were self-incriminating and against his penal interest. *Id.* at 817-18.

¶ 198 Defendant argues that here, like *Human*, Hiland's confession to Trumble and attorney Edens was made under circumstances that provide considerable assurance of its reliability: Hiland confessed to an attorney for the purpose of seeking legal advice. (The conversation was not privileged because it took place in front of Trumble.) Defendant further argues that the error was prejudicial because the fact was critical to the jury's assessment. He contends that Hiland had no ulterior motive to confess (such as to look tough or to convince his friend to give him money for

drugs) and that his statement would have been corroborated by DeCicco's confession, in which she told police that Hiland had met with an attorney. He further argues that there is no plausible reason for someone to confess to murder to an attorney (who is duty-bound not to repeat the information) other than to seek legal advice for the crime that the person actually committed. The State would have been free to argue to the jury that Hiland was merely boasting at the restaurant. Defendant argues that the evidence would have strengthened his case and asserts that the State cannot show beyond a reasonable doubt that the exclusion of this evidence was harmless.

¶ 199 We conclude that the trial court did not abuse its discretion in excluding Trumble's testimony. The fact that Hiland confessed in Trumble's presence was admitted at trial. The exclusion of the fact that Hiland did so to an attorney does not necessarily imbue the confession with trustworthiness (and thus make it more probable that defendant did not commit the crime). *Human*, upon which defendant relies, is distinguishable because it involved a confession to law enforcement, where the party did not stand to benefit from his statements. *Human*, 331 Ill. App. 3d at 817 (quoting *Kokoraleis*, 149 Ill. App. 3d at 1020-21) ("statements 'were more likely trustworthy because they tended to intensify police efforts to prosecute' the declarants"). Here, in contrast, the evidence at issue, that Hiland confessed to an attorney in a public place and in the presence of a third person, did not make it more likely that Hiland would be prosecuted.

¶ 200 Even if the court erred in excluding the testimony, we conclude that the error was harmless because the testimony was cumulative. An error may be harmless if it did not contribute to the outcome of an action, if overwhelming evidence supports the order of the trial court, or if the error pertained to evidence that was merely cumulative or corroborative of other evidence. *People v. Fletcher*, 328 Ill. App. 3d 1062, 1071-72 (2002). Several witnesses (Trumble, Kollross, McCauley

and Schwartz) testified that Hiland confessed to them. Further, the jury heard DeCicco's statement that Hiland told her that he spoke to an attorney because, after the Brummett gun was retrieved, he was worried that the group would go to jail. The jury no doubt would have reasonably inferred from DeCicco's testimony that Hiland confessed to the attorney. Thus, the evidence was admitted at trial and the exclusion of duplicate testimony from Trumble was harmless and did not prejudice defendant. *People v. Caffey*, 205 Ill. 2d 52, 92 (2001) (error in the exclusion of testimony is harmless where the excluded evidence is merely cumulative of the other evidence presented).

¶ 201 3. Admission of Collett's Out-of-Court Statements

¶ 202 Defendant next argues that the trial court erred in admitting Collett's out-of-court statements after he denied knowledge of or involvement in the shooting. The admitted evidence included his guilty plea, apology, and putatively inculpatory statements by defendant. Defendant asserts that the evidence was inadmissible: (1) as substantive evidence under section 115-10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1 (West 2012)), in that four statements were not proper impeachment because they were not inconsistent with his testimony, and, even if otherwise admissible, the two statements attributed to defendant were not admissible against him; and (2) Collett's testimony did not affirmatively damage the State's case. For the following reasons, we reject defendant's argument.

¶ 203 *(a) Admission as Substantive Evidence under Section 115-10.1*

¶ 204 Generally, a prior inconsistent statement may be used only for impeachment purposes. *People v. Morgason*, 311 Ill. App. 3d 1005, 1010 (2000). However, section 115-10.1 of the Code of Criminal Procedure of 1963 (725 ILCS 5/115-10.1 (West 2012)) (as well as Illinois Supreme Court Rule 801(d)(1)(A) (eff. Jan. 1, 2011), which is "functionally completely identical" to the

statutory provision (Michael H. Graham, Handbook of Illinois Evidence § 801.11, at 785 (10th ed. 2010)) allows the admission of a witness's prior inconsistent statement as substantive evidence under certain circumstances. It provides:

"§ 115-10.1. Admissibility of Prior Inconsistent Statements. In all criminal cases, evidence of a statement made by a witness is not made inadmissible by the hearsay rule if

(a) the statement is inconsistent with his testimony at the hearing or trial, and

(b) the witness is subject to cross-examination concerning the statement, and

(c) the statement—

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

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

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

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

(C) the statement is proved to have been accurately recorded by a tape recorder, videotape recording, or any other similar electronic means of sound recording.

> Nothing in this Section shall render a prior inconsistent statement inadmissible for purposes of impeachment because such statement was not recorded or otherwise fails to meet the criteria set forth herein." 725 ILCS 5/115-10.1 (West 2012).[8]

¶ 205 Thus, to be admissible under section 115-10.1, a statement must be inconsistent with the witness's testimony at trial, the witness must be subject to cross-examination, and the statement must either: (1) have been made under oath at a trial, hearing, or other proceeding; or (2) narrate, describe, or explain an event or condition of which the witness had personal knowledge, and meet at least one of three other requirements. If a prior inconsistent statement meets the requirements of section 115-10.1, it may be admitted as substantive evidence without an independent determination of its reliability or voluntariness. *People v. Barker*, 298 Ill. App. 3d 751, 761 (1998); *People v. Pursley*, 284 Ill. App. 3d 597, 609 (1996); *People v. Carlos*, 275 Ill. App. 3d 80, 84 (1995).

¶ 206 Defendant first argues that four of Collett's statements were erroneously admitted as substantive evidence under section 115-10.1 because they were not inconsistent with Collett's trial testimony. He additionally argues that the two statements that Collett attributed to defendant were not based on Collett's personal knowledge and, thus, did not meet the standards of section 115-10.1. The State contends that defendant forfeited review of these claims because he never objected to the substantive admission of the prior inconsistent statements on the bases he now advances. It notes that, in his posttrial motion, defendant conceded that the statements met section 115-10.1's requirements, but that the State could not call Collett because it knew he would not testify in a manner favorable to the State. See *People v. Eyler*, 133 Ill. 2d 173, 219 (1989) (a specific objection

[8]See also Illinois Rules of Evidence 801(d)(2) (Ill. R. Evid. 801(d)(2) (eff. Jan.1, 2011)).

waives all grounds not specified). We conclude that the claims are forfeited, but address defendant's argument that the admission of the statements as substantive evidence constituted plain error.

¶ 207 Defendant failed to object to the testimony at trial or include the issue in his posttrial motion. Accordingly, defendant has procedurally defaulted the alleged error in admitting the testimony unless we conclude that plain error affecting a substantial right has occurred. See *People v. Williams*, 193 Ill. 2d 1, 26-27 (2000). In order to obtain relief, defendant must establish that an error occurred. *People v. Hillier*, 237 Ill. 2d 539, 545 (2010). The plain-error doctrine allows errors not previously challenged to be considered on appeal if either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). We first consider whether error occurred. *Williams*, 193 Ill. 2d 1 at 27.

¶ 208 The first statement defendant challenges is Collett's guilty plea. Collett testified that he had no idea who robbed the Burrito Express. The State asked defendant if he had pleaded guilty to the offense, and Collett testified that he had and that he had not been forced to do so. The State next asked Collett why he pleaded guilty to attempted armed robbery if he was not involved, and Collett replied that, based on his attorney's advice, he agreed to take a "plea of convenience" to avoid a lengthy prison term if convicted.

¶ 209 "[P]rior testimony need not directly contradict testimony given at trial to be considered 'inconsistent' [citation] and is not limited to direct contradictions but also includes evasive answers, silence, or changes in position." *People v. Martinez*, 348 Ill. App. 3d 521, 532 (2004). We agree

with the State that Collett's guilty plea is clearly inconsistent with his testimony at defendant's third trial that he had no knowledge of who attempted to rob the Burrito Express on March 6, 2001.

¶ 210 The second statement defendant challenges concerns Collett's statement to Briseno's widow. The State asked Collett if he recalled Briseno's widow testifying at his sentencing hearing "to the impact this had on her life" and read Collett's apology. Collett testified that he made the statement, but explained that he was expressing sorrow for the family's grief, not personal remorse for committing the crime. Defendant argues that the widow's testimony regarding the "impact on her life" was hearsay and that Collett's response (his apology) was not inconsistent with his trial testimony, where he did not admit involvement but apologized for her loss. We reject this argument.

¶ 211 Collett's statement at his guilty plea to Briseno's widow that, "I really if I would have known that any of this would have happened, I really would have tried to do something to stop it, but, honestly, I didn't think that anything like that would have happened was going to happen [*sic*]," suggests involvement in the incident to the point that he could have, but did not, try to stop it (presumably the murder). This contradicts his testimony that he had no knowledge of who committed the crime.

¶ 212 The third statement that defendant challenges addresses the sounds Collett stated that he heard. After Collett testified that he heard what sounded like a car backfiring, the State asked him about his prior statement to police, on May 12, 2001, that the sound he heard was gunshots. Defendant argues that Collett's statement was not inconsistent with his prior statements, where Collett explained that the police asked him if the sound of the car backfiring could have been shots and he said that he did not know. This claim also fails. Regardless of whether the police first suggested the possibility of gunshots instead of a car backfiring, Collett acknowledged that he told

the officers in 2001 that he heard shots and that there could have been two of them. This contradicted his testimony at trial that he heard a noise that sounded like a car backfiring.

¶ 213 The fourth challenge defendant raises concerns statements Collett made to police about potentially inculpatory statements defendant allegedly made shortly after the robbery: (1) defendant stated "that some kids just robbed the Burrito Express;" and (2) that he "just had some fun." Defendant argues that the statements were not inconsistent with Collett's testimony because they did not implicate Collett in any way, he did not change his testimony, and were not based on Collett's personal knowledge.

¶ 214 Collett's trial testimony that he did *not* speak to defendant about what had occurred at the restaurant after the shooting *was inconsistent* with his prior statements that defendant *had made statements* to Collett relating to what had happened at the Burrito Express. As noted, while in McMullen's car, defendant stated that some kids had just robbed the restaurant and, later at Weisenberger's house, defendant stated, according to Collett, "just had some fun."

¶ 215 Defendant additionally argues that the statements he made were not substantively admissible because they were not within Collett's personal knowledge as required by section 115-10.1. Defendant relies on case law that holds that, for a witness to have personal knowledge, the witness must have observed, and not merely heard, the subject matter underlying the statement. *Morgason*, 311 Ill. App. 3d at 1011 (noting that "personal knowledge" excludes statements, including admissions, made to the witness by a third party, where the witness has no firsthand knowledge of the event that is the subject of the statements made by the third party); *People v. McCarter*, 385 Ill. App. 3d 919, 930-31 (2008); *People v. Coleman*, 187 Ill. App. 3d 541, 546-48 (1989) (for witnesses to have "personal knowledge" of event or condition within meaning of statute, "overwhelming

authority" supports interpretation that witness must have personally observed underlying events; simply overhearing incriminating statements made by the defendant is not enough); see also *People v. Fillyaw*, 409 Ill. App. 3d 302, 312 (2011) (holding that a statement made to a testifying witness by a third party describing events of which the testifying witness has no firsthand knowledge is inadmissible as substantive evidence under section 115-10.1(c)(2)); *People v. Bueno*, 358 Ill. App. 3d 143, 157-58 (2005); *People v. Fields*, 285 Ill. App. 3d 1020, 1028 (1996) ("[t]he personal knowledge requirement limits the use of out-of-court statements to those events the witness actually observed"); *People v. Morales*, 281 Ill. App. 3d 695, 700 (1996) (requirement is not satisfied when the witness merely testifies as to what another claims to have done); *People v. Williams*, 264 Ill. App. 3d 278, 290 (1993); *People v. Saunders*, 220 Ill. App. 3d 647, 658 (1991); *People v. Hastings*, 161 Ill. App. 3d 714, 720 (1987). The rationale for requiring a witness to personally observe the events that are the subject matter of his or her comments is that a witness is less likely to repeat another's statement if he or she witnessed the event and knows that the statement is untrue. *Morales*, 281 Ill. App. 3d at 701.

¶ 216 Here, the State relies on the supreme court's decision in *People v. Thomas*, 178 Ill. 2d 215, 239 (1997), wherein the court stated that "[a]ssuming without deciding that the personal knowledge required under the statute must be from observing the event, [the witness] witnessed the argument between defendant and [his co-conspirator] and her statement described and narrated the event. Thus, [the witness's] prior inconsistent hearsay statement was admissible under the statute." *Id.* at 239. Again, the State concedes that appellate districts have "uniformly disagreed and determined that the witness must have observed the events described in the underlying statement, not just have

heard a statement about the events." It requests that we consider the merits of *Thomas*, where, here, Collett was subject to cross-examination about what he heard.

¶ 217 We need not re-examine *Thomas* because we are bound to follow it. See, *e.g.*, *People v. Fountain*, 2012 IL App (3d) 090558, ¶23 ("As an intermediate appellate court, we are bound to honor our supreme court's conclusion on [an] issue unless and until that conclusion is revisited by our supreme court or overruled by the United States Supreme Court."). Defendant's characterization of the case law is misleading. The cases decided after *Thomas* that support defendant's proposition either do not mention *Thomas* at all (*Fillyaw*, 409 Ill. App. 3d at 312; *McCarter*, 385 Ill. App. 3d at 930-31; *Bueno*, 358 Ill. App. 3d at 157-58) or distinguish it (*Morgason*, 311 Ill. App. 3d at 1011-12). Again, *Thomas* holds that it is sufficient that the witness heard the statements being made without personal knowledge of the underlying content. That requirement was met here. Accordingly, no error occurred in admitting the statements, and, further, there was no plain error.

¶ 218 *(b) Affirmative Damage*

¶ 219 Next, defendant argues alternatively that Collett's statements could not have been admitted for impeachment purposes because they did not affirmatively damage the State's case. As to this argument, which is not forfeited, defendant contends that no witness identified Collett or placed him at the Burrito Express and that even Houghtaling's statements made no mention of Collett's involvement or knowledge of the crime. Thus, the State should not have been allowed to impeach its own witness. Defendant asserts that the State did not present evidence that a third man (*i.e.*, Collett) was involved in any way in the shooting and, therefore, Collett's testimony that he was not involved was not damaging. He points to the fact that Pardo testified that he never saw a third man and that Houghtaling said nothing about Collett. Further, Collett's testimony acknowledged that

defendant and Houghtaling were in the area at the time of the shooting and that Collett did not see who committed the crime. Defendant emphasizes that, where there were no other inculpatory statements by defendant, Collett's testimony could easily have affected the outcome.

¶ 220 The admissibility of impeachment evidence is a matter within the sound discretion of the trial judge. *People v. Baggett*, 115 Ill. App. 3d 924, 934 (1983). The State may attack the credibility of a witness, even its own witness, by impeaching the witness with a prior inconsistent statement. *People v. Cruz*, 162 Ill. 2d 314, 358 (1994). This is so even if the statement does not meet all of the requirements of section 115-10.1. See 725 ILCS 5/115-10.1 (West 2010) ("Nothing in this Section shall render a prior inconsistent statement inadmissible for purposes of impeachment because such statement *** fails to meet the criteria set forth herein."). However, when the State impeaches its own witness with a prior inconsistent statement, the State must show that the witness's trial testimony affirmatively damaged its case. *Cruz*, 162 Ill. 2d at 360; see also Illinois Rules of Evidence 607 (eff. Jan.1, 2011). The testimony must do more than merely disappoint the State by failing to incriminate the defendant; it must give "positive aid" to the defendant's case, such as by being inconsistent with the defendant's guilt under the State's theory of the case. *Cruz*, 162 Ill. 2d at 360-62. It is insufficient that a witness merely disappoints the State by failing to incriminate the defendant. *Id.* at 362-63 (witness's "affirmative testimony was entirely neutral. [Her] testimony that she had not observed defendant and [a non-testifying third party who had confessed to the crime] together was similarly neutral. This evidence neither contradicted any evidence presented by the State nor provided positive aid to defendant's body of evidence. As a result, while the State may have been disappointed that [the witness] did not testify in accordance with what was expected of her, the prosecution's case was no worse off than had [the witness] not taken the stand at all."); see

also *People v. McCarter*, 385 Ill. App. 3d 919, 933 (2008) (prior inconsistent statements held inadmissible, where witness's refusal to incriminate the defendant did not cause affirmative harm to the State's case; she did not offer evidence of the defendant's innocence, but merely declined to come forward with evidence of his guilt).

¶ 221 We conclude that Collett's denial of involvement in the shooting not only affirmatively damaged the State's case, but also gave positive aid to defendant's case. The State's theory of the case was that defendant and Houghtaling went to rob the Burrito Express, with McMullen driving the car and Collett acting as a lookout. (Houghtaling's testimony from his Omaha interview and defendant's second trial placed Collett inside McMullen's waiting car when Houghtaling ran inside after the shooting.) Collett's denial of involvement and his statements that he did not know who robbed the restaurant clearly damaged the State's case. Further, Collett's denial of involvement in and of knowledge of who committed the crime aided defendant's position that he was *not* involved in the shooting (and reinforced defendant's theory that another group was involved). Had Collett not taken the stand, the State's case would have been better off because his denial would not have been admitted into evidence. Further, defendant's case was aided by affirmative testimony that Collett (and, by association, defendant) was *not* involved in the crime.

¶ 222 In summary, the trial court did not err in admitting Collett's out-of-court statements.

¶ 223 4. Exclusion of Pardo's Inconsistent Statements

¶ 224 Defendant next argues that the trial court erred in excluding Pardo's prior inconsistent statements, where the ruling did not allow the defense to perfect their impeachment of Pardo regarding Houghtaling's green jacket. For the following reasons, this claim fails.

¶ 225 Pardo testified that the man without the gun who entered the Burrito Express on the night of the shooting wore a green leather jacket that looked like the green jacket in People's exhibit No. 66 (Houghtaling's jacket). Houghatling's jacket is green leather, with three front pockets, a zipper with a zipper flap, and areas of black on: the elbows, a patch just below the center of back of the collar, around the snaps for the zipper flap, horizontal strips above the lower pockets, and the logo on the breast pocket. On cross-examination, defense counsel attempted to elicit testimony that Pardo gave a description of the jacket to police four hours after the shooting that was inconsistent with his trial testimony. Counsel asked Pardo if he had described the jacket as black around the collar, and Pardo stated that he could not recall. Pardo also could not recall stating that the jacket was green with some black or that he did not see any pockets or a zipper on the front of the jacket. The defense then called Detective Jeff Rhode, who interviewed Pardo on the evening of the shooting. Rhode testified that he asked Pardo if the jacket worn by one of the suspects was a solid color, and Pardo replied that it was green with some black on it, but that he did not remember well. When defense counsel asked Rhode whether he asked Pardo if the jacket had on it a pattern or design, the court sustained the State's objection.

¶ 226 In its offer of proof, the defense stated that it would have asked Rhode the following questions about his interview of Pardo: whether Pardo noted a pattern or design, to which Pardo stated that he did not see a design; whether the coat had black all over, to which Pardo stated that he saw only parts of black around the collar area; and whether the coat had pockets or a zipper in the front, to which Pardo stated that he did not see any.

¶ 227 Here, defendant argues that Pardo's description of the jacket immediately after the crime was committed was not consistent with the jacket police recovered from Houghtaling. On cross-

examination, defense counsel attempted to elicit testimony that Pardo gave police a description that was inconsistent with his trial testimony (that the jacket recovered from Houghtaling looked like the one worn by the man without the gun). Pardo stated he could not recall and, defendant called Rhode in an attempt to perfect the impeachment, wherein the trial court sustained the State's objection. Defendant urges that, given that the State had no eyewitness identification and attempted to substitute Pardo's description of the jacket for that identification, any detail affecting Pardo's description should have been heard by the jury. Further, Pardo identified the jacket in front of the jury, and the fact that he could not remember making certain statements was no substitute, defendant argues, for being able to point out that he had made contrary statements. The State responds that any error in the exclusion of the testimony was harmless. We agree with the State.

¶ 228 Harmless-error analysis applies where the defendant has timely objected; the State bears the burden of persuasion with respect to prejudice. That is, "the State must prove beyond a reasonable doubt that the jury verdict would have been the same absent the error." *People v. Thurow*, 203 Ill. 2d 352, 363 (2003). In determining whether, in the absence of the error, the outcome of the trial would have been different, review is made of the proceedings as a whole, based upon examination of the entire record. *People v. Howard*, 147 Ill. 2d 103, 148 (1991).

¶ 229 We agree with the State that any discrepancies in the description of the jacket were minor and could not have contributed to the verdict. Defendant was not completely precluded from perfecting his impeachment of Pardo. The jury did hear (from Rhode) that Rhode asked Pardo if the jacket worn by one of the suspects was a solid color, and Pardo replied that it was green with some black on it, but that he did not remember well. What the jury did not hear were Pardo's statements to police that he saw no design, pockets, or zipper on the jacket and that the black he saw was around

the collar. The jacket retrieved from Houghtaling, in fact, had no design, and it had a patch of black in the center just below the collar. Further, Houghtaling's jacket has a flap that covers the zipper; thus, the zipper could have been concealed during the crime. We also note that Pardo testified on direct examination that the jacket was green and that he could not recall saying that it had any other colors on it, but the jurors viewed a photograph of Houghtaling wearing the jacket and observed the black on it; thus, they were aware of the inconsistencies in Pardo's testimony. Finally, defense counsel argued during closing argument that Houghtaling's jacket had a zipper and pockets, but that Pardo did not recall saying anything about that, so, he had not identified that jacket as being the jacket on the man at the scene beyond a reasonable doubt; thus, the issue of Pardo's lack of memory was put before the jurors. Under these circumstances, we conclude that the incomplete perfection of defense counsel's impeachment was harmless beyond a reasonable doubt.

¶ 230 5. Admission of Houghtaling's Out-of-Court Statements

¶ 231 Next, defendant argues that the admission of Houghtaling's out-of-court statements was highly prejudicial error that deprived defendant of his federal and state constitutional rights to due process. Defendant asserts that the State knew that Houghtaling would not support its case, but called him anyway, and, over objection, was permitted to admit as substantive evidence his hearsay statements (from the May 2001 Omaha interview; McMullen's trial; and defendant's second trial), inculpating defendant. This was, defendant contends, the only substantive evidence inculpating defendant. Defendant argues that the State should not have been permitted to call Houghtaling for this purpose because the State admittedly knew he would not support its case and Houghtaling's hearsay statements were inherently unreliable. For the following reasons, we find no error.

¶ 232 Defendant's arguments fall into two categories: (1) that the admission of Houghtaling's out-of-court statements, although sufficient under section 115-10.1, violated his due process rights because they were not reliable (because the testimony was inconsistent or plainly incredible, because accomplice testimony is fraught with serious weaknesses, and because under the facts here the recanted prior inconsistent statements could not support the conviction); and (2) to the extent section 115-10.1 is satisfied, it is unconstitutional as applied because Houghtaling's statements were inherently unreliable. We do not address the first argument here because it is a challenge to the sufficiency of the evidence, which we addressed above, including the specific arguments raised here.

¶ 233 As to the second issue, "[a] holding that a statute is unconstitutional as applied does not broadly declare a statute unconstitutional but narrowly finds the statute unconstitutional under the specific facts of the case." *People v. Huddleston*, 212 Ill. 2d 107, 131 (2004). Defendant's argument has been rejected. In *People v. Morales*, 281 Ill. App. 3d 695 (1996), the court rejected the defendant's argument that the substantive use of a witness's prior inconsistent statements denied him due process and a fair trial. The court held that section 115-10.1 incorporates safeguards which "foster reliability" and "adequately protects the defendant's constitutional rights. The Illinois legislature clearly intended the statute to be *the only inquiry necessary in determining whether to admit prior inconsistent statements*." (Emphasis added.) *Id.* at 702-03. The court further noted that due process considerations, such as " 'prevent[ing] convictions where a reliable evidentiary basis is totally lacking,' are fully addressed when the requirements of the Illinois statute are satisfied." *Id.* (quoting *California v. Green*, 399 U.S. 149, 163-64 n.15 (1970)). Pursuant to *Morales*, we reject defendant's request that we consider constitutional factors in addition to and separate from those contained in section 115-10.1. We further note that defendant's argument essentially challenges the

sufficiency of the evidence, and we addressed above his specific claims concerning the reliability of Houghtaling's testimony.

¶ 234 6. Exclusion of Portions of Defendant's Cross-Examination of Houghtaling

¶ 235 Defendant also argues that the trial court erred in limiting defendant's cross-examination of Houghtaling, contending that this was highly prejudicial error that deprived him of his due process rights. Specifically, he complains that the court erred in not allowing defense counsel to elicit testimony from Houghtaling that he had: (1) read newspaper accounts that contained details that were the same details he gave to the police and in court on two prior occasions; and (2) invoked the fifth amendment when called to testify at defendant's first trial.

¶ 236 As to the press accounts, defendant argues that defense counsel should have been permitted to question Houghtaling because his testimony about the source of his knowledge about the details of the crime was not hearsay (because it was offered to show how Houghtaling had knowledge of these details, not that the details were accurate) and a proper foundation was laid for the testimony (where Houghtaling was asked to testify about his personal knowledge). According to defendant, the fact that Houghtaling could not remember the specific date, time, and location that he learned each fact does not make the exclusion proper; rather, the point was that he obtained knowledge of the facts upon which the State relied from somewhere other than perceiving those facts himself. They included that the police thought that there were two young men involved, both wearing black ski masks; one man had a handgun; Briseno and an employee chased the two men out of the restaurant; Briseno struggled with one of the men in the parking lot; and Briseno was shot by the other masked man.

¶ 237 Alternatively, the State argues that, even if the court erred, the error was harmless because it was cumulative to evidence that was admitted from other sources: Detective Brogan and Officer Wigman testified about information released to the public and the details that were withheld. Thus, the jurors knew that most of the details of the offenses were in the public domain. Further, during closing argument, the defense argued that many of the details Houghtaling testified to were public or suggested to him by police officers during his first statement.

¶ 238 "A defendant's rights under the confrontation clause are not absolute. Rather, 'the Confrontation Clause guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' " (Emphasis in original.) *People v. Jones*, 156 Ill. 2d 225, 243-44 (1993) (quoting *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985)). Our supreme court has repeatedly held that "a trial judge retains wide latitude to impose reasonable limits on such cross-examination based on concerns about harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or of little relevance." *People v. Kliner*, 185 Ill. 2d 81, 134 (1998); *People v. Blue*, 205 Ill. 2d 1, 13 (2001). "The latitude permitted on cross-examination is a matter within the sound discretion of the trial court, and a reviewing court should not interfere unless there has been a clear abuse of discretion resulting in manifest prejudice to the defendant." *Kliner*, 185 Ill. 2d at 130.

¶ 239 We hold that the trial court did not err in excluding the testimony. We reject defendant's assertion that the fact that Houghtaling could not recall the specific date, time, and location that he learned each fact does not make the exclusion proper. We further note that defense counsel *was* allowed to establish the dates of Houghtaling's prior statements in which he incriminated himself and defendant. Defense counsel also established that Houghtaling knew certain details about the

crime from newspapers and speaking to people. As the State notes, the trial court foreclosed only further questions that would have pinpointed each specific detail that Houghtaling claimed he learned from those sources. This was proper because defense counsel was unable to lay a foundation as to when or through what specific source Houghtaling claimed to have learned the details. Thus, the court did not abuse its discretion in limiting cross-examination. *Id.* at 130-31 (court did not abuse its discretion in precluding cross-examination of witness regarding his alleged drug use, where the defendant did not lay a proper foundation to support his claim).

¶ 240 As to Houghtaling's invocation of the fifth amendment at defendant's first trial, defendant argues that the trial court erred in sustaining the State's objection that the testimony was irrelevant. Defendant sought to elicit testimony that Houghtaling had been called to testify against defendant in 2003, that Houghtaling refused to testify, and the reason he refused was because neither he nor defendant were involved in the shooting. Here, defendant contends that the testimony was relevant because the State accused Houghtaling of recently fabricating his testimony. Defendant argues that Houghtaling's refusal to testify at the first trial is consistent with his being innocent and truthful. He notes that a prior *consistent* statement is admissible to show that a witness told an identical story prior to the time of the alleged fabrication. *People v. Mullen*, 313 Ill. App. 3d 718, 730 (2000). Houghtaling's prior refusal to testify against defendant, defendant urges, makes clear that his direct testimony was not a recent invention, unanticipated by the State.

¶ 241 Generally, a witness's prior consistent statements are not admissible for the purpose of corroborating the witness's trial testimony because they serve to unfairly enhance the credibility of the witness. *People v. Terry*, 312 Ill. App. 3d 984, 995 (2000). "The 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." *People v. Smith*, 139 Ill. App. 3d 21, 33 (1985). Prior consistent statements may not be admitted merely because a witness has been discredited or impeached. *People v. Bobiek*, 271 Ill. App. 3d 239, 244 (1995); see also *People v. DePoy*, 40 Ill. 2d 433, 438-39 (1968).

¶ 242 A witness's prior consistent statement is admissible only to rebut a charge or inference he or she was motivated to lie or his or her testimony was of recent fabrication, as long as the prior consistent statement was made before either the motive arose or the alleged fabrication was made. *People v. Smith*, 362 Ill. App. 3d 1062, 1081 (2005); see also *People v. House*, 377 Ill. App. 3d 9, 19 (2007) (prior consistent statements may be introduced to rebut allegation that witness was motivated to testify falsely or otherwise rebut allegation of recent fabrication, but prior consistent statement must have been made prior to the existence of the alleged motive to testify falsely or the alleged fabrication). Charges of recent fabrication and charges of a motive to testify falsely are separate exceptions to the general rule that prohibits proof of prior consistent statements. *People v. Antczak,* 251 Ill. App. 3d 709, 716 (1993). The party seeking to introduce the prior consistent statement has the burden of establishing that *the statement predates the alleged recent fabrication or predates the existence of the motive to testify falsely*. *People v. Deavers*, 220 Ill. App. 3d 1057, 1072-73 (1991). Prior consistent statements are admitted solely for rehabilitative purposes, not as substantive evidence. *People v. Walker*, 211 Ill. 2d 317, 344 (2004).

¶ 243 Here, defendant has failed to sufficiently establish that Houghtaling's invocation of the fifth amendment at defendant's first trial predated his recent fabrication. Houghtaling's prior refusal (at the first trial) to testify against defendant does not, as defendant suggests, corroborate his testimony

at the third trial (that defendant did not commit the crime). Houghtaling's refusal to testify at the first trial does not necessarily reflect that, had he testified there, he would have exculpated defendant; he could have implicated him. Thus, defendant has not established that the prior statement is even consistent with Houghtaling's testimony at the third trial. Accordingly, we cannot conclude that the trial court abused its discretion in excluding the testimony.

¶ 244 7. Exclusion of Testimony Concerning Proper Police Interrogation Techniques

¶ 245 Next, defendant argues that the trial court erred in excluding testimony about proper police interrogation techniques and that this was highly prejudicial and deprived him of his due process rights. Defendant sought to elicit testimony from Wigman about the John Reid method of interrogation and the desirability of obtaining corroborative information during a confession. The trial court sustained the State's objection on the grounds of relevance and that it would be cumulative. Defendant argues that the reliability of Houghtaling's Omaha confession was a critical issue in the case and that Wigman's testimony would have established that, during Houghtaling's interrogation, the police did not use the most effective method for obtaining a truthful statement and that Houghtaling's purported confession did not contain any corroborating details, thus, calling into question its reliability. Defendant concedes that Brogan provided similar testimony earlier at trial, but argues that Wigman's testimony was important because: (1) his extensive training in police techniques and procedures would have lent considerable weight to the problems with Houghtaling's interrogation; and (2) Wigman was in charge of the investigation and knew all details that were released to the public and those intentionally held back, and, thus, his testimony would have been particularly probative as to whether Houghtaling's statement contained any corroborating details.

¶ 246 We conclude that the trial court did not abuse its discretion in excluding the testimony on the basis that it was cumulative to Brogan's testimony. Detective Brogan participated in the interrogation of Houghtaling and testified that he had training in the John Reid interrogation technique (which encourages police to attempt to elicit corroborating information for a confession) and was the lead detective in the case. He described independent and dependent corroboration (the latter being where a suspect demonstrates knowledge of facts about a crime that police have kept secret from the public, such as the pistol-whipping or the shout into the passing car) and explained that investigators try to avoid using leading questions. During his testimony, Brogan listed the information that was public about the crime. He also testified that Houghtaling first suggested the following answers in response to nonleading questions: that the gun was a .22-caliber weapon and that his jacket was green. Wigman similarly testified that he has interview and interrogation training, including at the John Reid school. He stated that some information was not made public about the crime, including that Briseno had a head wound and that Pardo stated that Briseno had yelled into a passing car. This was done, Wigman testified, so that police could assess the credibility of people interviewed. In its offer of proof as to Wigman's testimony, defense counsel stated that Wigman, who was in charge of the crime scene, would have testified that he was trained in the John Reid technique, would have described dependent and independent types of corroboration, and described whether the information that was withheld from the public was an example of dependent corroboration. This proposed testimony was clearly cumulative to Brogan's testimony. We cannot conclude that the trial court abused its discretion in excluding it.

¶ 247 8. Admission of Additional Evidence

¶ 248 Defendant next argues that the trial court erred in admitting certain other evidence. He raises three claims of error. First, defendant contends that the court erred in allowing the State to question Weisenberger about his drug use and drug use by defendant, Houghtaling, and Collett. We reject this argument.

¶ 249 On cross-examination, the State asked Weisenberger questions about his memory on the evening of the shooting. He could not recall what Collett wore, and when asked whether he had a good memory or a bad one, he replied "in the middle." The State then asked him who drank beer that evening, and he testified that they all did. Weisenberger then stated that he had consumed five or six beers before the group arrived (which gave him a "buzz") and drank about 12 more after they arrived. He denied smoking "dope," and, when asked if he had ever done so, he replied that he did when he was 17 years old. Next, the State asked Weisenberger what "other drugs did you take? Any other drugs?" Defense counsel objected as beyond the scope, the State responded that the question went to his credibility, and the court overruled the objection. Weisenberger answered, "I'm sure I have." The State asked, "Like what?" and he replied, "I've tried cocaine twice and random pills over the years." Continuing, the State asked Weisenberger if the others in the group were drinking that night, and he stated that they were. The State then asked, "Was anybody else ingesting drugs at your house?" Over defense counsel's objection, Weisenberger replied that they smoked pot on the porch. "I believe Ken, Dave, and Justin" for a couple of minutes.

¶ 250 As to Weisenberger's condition on the evening of the shooting, the State concedes that the prosecutor's question that elicited the response that Weisenberger last used marijuana when he was 17 years old was improper. However, it argues that any error was harmless where Weisenberger had testified that he had used cocaine and "random pills over the years." Defendant replies that

Weisenberger did not offer this testimony about his cocaine and pill use on his own; rather, the testimony was elicited after the prosecutor asked him, "Like what?" We conclude that any error was harmless and did not contribute to the conviction. Weisenberger testified that he had a "buzz" from the numerous cans of beer he had consumed. In attempting to further test his credibility, the State's two questions concerning his drug use, although improper, did not, in our view, contribute to his conviction because they were cumulative to the testimony concerning his "buzz" from consuming at least 17 cans of alcohol.

¶ 251 As to the prosecutor's question whether defendant, Houghtaling, and Collett had used drugs, we agree with the State that any error was harmless because that testimony was also cumulative. The prosecutor asked Weisenberger only a single question on this topic. Further, Houghtaling himself, during his Omaha interview, stated, " 'We sat there. We drank a little bit. Uh, then we went outside, smoked a joint, and Kenny came up to me. It was like come with me. I want to go do something.' " This testimony was admitted substantively. Thus, the jury heard from Houghtaling about the defendant's marijuana use. (We reject defendant's argument that the foregoing testimony reflects that only Houghtaling smoked marijuana.)

¶ 252 Second, defendant argues that the court erred in admitting two autopsy photos of Briseno's body, asserting that they are gruesome and do not reflect the state of the victim's body after the crime and, thus, are not probative. Further, defendant asserts that the cause of Briseno's death was not disputed and that the sole purpose of the photos was to introduce inflammatory evidence to prejudice defendant.

¶ 253 We agree with the State that the law of the case doctrine precludes this court from reconsidering this issue. In the appeal from defendant's second trial, this court addressed the

identical issue—the admission of the same two autopsy photos—and determined that the trial court did not abuse its discretion in admitting both exhibits. *People v. Smith*, No. 2-08-1106 (2010) (unpublished order under Supreme Court Rule 23). Under the law of the case doctrine, the parties cannot relitigate issues that have already been decided in the case. *People v. Tenner*, 206 Ill. 2d 381, 395 (2002). The doctrine applies to lower courts when a higher court has decided an issue and the underlying facts have not changed (*Weiss v. Waterhouse Securities, Inc.*, 208 Ill. 2d 439, 447-49 (2004)), as well as to a court's own decisions in a case (*People v. Patterson*, 154 Ill. 2d 414, 468 (1992)). Here, the law of the case doctrine binds us to our previous ruling because the same issue and identical parties were before this court. See, *e.g.*, *People v. Young*, 263 Ill. App. 3d 627, 633 (1994). Accordingly, we reject defendant's argument.

¶ 254 Third, defendant argues that the trial court abused its discretion in not striking Detective Brogan's answer to a defense question. Specifically, defense counsel asked Brogan on cross-examination if he knew the caliber of the murder weapon being sought and Brogan stated that it was a .22-caliber gun. When defense counsel asked him if police were looking for a revolver or semi-automatic weapon, Brogan answered that it was a revolver. Defense counsel then asked, "Why did you believe at that time that it was a revolver?" Brogan began to respond, "We believed it was a revolver based on statements made by Miss McMullen," when defense counsel attempted to withdraw the question. The State asked that the witness be allowed to finish his answer, and the court allowed it. Brogan answered, "Miss McMullen, for one, told us that she had seen [defendant] with a revolver." Defense counsel requested that the court strike the answer, and the State objected, noting that the defense itself had asked the question. The court denied defense counsel's request.

Defense counsel then asked Brogan if police thought that the gun was a revolver because there were no casings found at the scene. Brogan replied in the affirmative.

¶ 255 Here, defendant argues that Brogan's answer was non-responsive and "designed to place inadmissible evidence before the jury, because the State did not (and could not, given its concerns with her reliability) call McMullan." Defendant further argues that the true reason that police believed that a .22-caliber revolver was used in the shooting was because: (1) as Brogan testified to in his next answer, there were no shell casings found at the scene; and (2) the autopsy had been performed at this time and the bullet was recovered. Defendant notes that McMullen did not testify at his third trial and defendant had no opportunity to question her about the statement. Further, the probative value of the evidence was, he argues, clearly outweighed by the danger of unfair prejudice (see Illinois Supreme Court Rule 403 (eff. Jan. 1, 2011) (relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice)). We reject this argument.

¶ 256 When a defendant procures, invites, or acquiesces in the admission of evidence, even though the evidence is improper, the defendant cannot contest the admission on appeal. *People v. Bush*, 214 Ill. 2d 318, 332 (2005); see also *People v. Johnson*, 368 Ill. App. 3d 1146, 1155 (2006) ("A party cannot complain of error that he himself injected into the trial."). Because defense counsel elicited the testimony here, we reject defendant's claim.

¶ 257 9. Cumulative Error

¶ 258 Defendant's final argument is that the cumulative effect of the trial court's multiple evidentiary errors denied him a fair trial and, thus, warrant reversal of is convictions. See *People v. Speight*, 153 Ill. 2d 365, 376 (1992) (individual trial errors may have the cumulative effect of

denying a defendant a fair trial). Here, we have rejected all of defendant's claims of error. Specifically, we rejected the majority of defendant's claims on the merits, or concluded (as to two claims) that any error that may have occurred was harmless. Looking at the matters cumulatively, the record reveals that the trial, taken as a whole, was fair. Accordingly, defendant is not entitled to a new trial on the basis of cumulative error. *People v. Hall*, 194 Ill. 2d 305, 350-51 (2000); *People v. Desantiago*, 365 Ill. App. 3d 855, 871 (2006).

¶ 259 III. CONCLUSION

¶ 260 For the foregoing reasons, the judgment of the circuit court of McHenry County is affirmed.

¶ 261 Affirmed.