FIRST DIVISION
March 21, 2011

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No. 1-08-3147

IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 05 CR 17034
	)	
MICHAEL MAJOR,	)	
	)	The Honorable
Defendant-Appellant.	)	Kenneth J. Wadas,
	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Hall and Justice Hoffman concurred in the judgment.

O R D E R

HELD: The evidence was sufficient to support defendant's second degree murder conviction. Despite the trial court's failure to comply with Supreme Court Rule 431(b), the errors were not reversible. The majority of the comments challenged in the State's rebuttal were proper, and defendant was not prejudiced by the two comments that were improper. Defendant's sentence was not an abuse of discretion.

Following a jury trial, defendant, Michael Major, was

convicted of second degree murder and sentenced to 16 years' imprisonment. On appeal, defendant contends: (1) the State failed to prove him guilty beyond a reasonable doubt; (2) the trial court failed to follow the dictates of Supreme Court Rule 431(b); (3) he suffered prejudice as a result of the State's numerous improper rebuttal arguments; and (4) the trial court considered improper factors in fashioning defendant's sentence. Based on the following, we affirm defendant's conviction and sentence.

FACTS

On June 18, 2005, defendant fatally stabbed the victim, Antonio Wright, in the chest while outside Ford's Hair Salon located at 7759 S. Halsted Street in Chicago, Illinois. The victim was a transvestite also known as Antonio Sydney or Sydney.[1] The State argued that defendant initiated an altercation with the victim during which defendant punched the victim in the chest with a knife. Defendant argued instead that the victim initiated the altercation and, in an effort to defend himself, defendant caused a knife, which the victim was holding, to plunge into the victim's chest.

Ford's Hair Salon is located on the northeast corner of

[1]The victim will be referred to as she or her where appropriate.

Halsted Street and 78th Street. 78th Street is a one way street running west. The Sixth District police station is located across the street from the salon on the southwest corner of Halsted Street and 78th Street. The police station parking lot is on the northwest corner of Halsted Street and 78th Street.

Katie Bell-McElroy testified she was a long-time friend of the victim, considering the victim to be her mother in the gay community. At the time in question, the victim was in the process of undergoing a sex change. On June 18, 2005, a group gathered at Ford's Hair Salon, where the victim was a hairstylist, in honor of the victim's birthday. McElroy arrived with Howanda Williams between 5:30 p.m and 6 p.m. Both women were homosexual. The salon was about to close to customers for the victim's party. McElroy noticed the victim was talking to a woman named Lisa. Lisa was a customer that had brought her newborn baby to the salon to meet the victim. The victim was drunk at the time. Neither McElroy nor Williams consumed any alcohol at the party.

The victim then left the salon with her boyfriend, Peter, to get some air. The pair went to the victim's car, which was parked on the south side of 78th Street, and sat inside. The victim fell asleep in the passenger seat. About 20 or 30 minutes later, McElroy proceeded outside after being informed that Peter

was seen taking the victim's tip money from inside the victim's bra while she slept. The victim was wearing a red and white "Baby Phat" capri outfit at the time. McElroy approached the passenger side of the car and demanded that Peter step out of the car. Peter refused. McElroy then attempted to awaken the victim and remove her from the car. Peter eventually exited the car and fled.

Meanwhile, defendant approached in his Buick, parked on the north side of 78th Street, and began shouting obscenities at the victim. Defendant yelled, "faggot, I'm going to beat you're a**, sissy." Defendant's wife, Lisa, the individual that was in the salon earlier, was in the passenger seat and the newborn baby was in the back seat. Defendant exited his car and walked toward McElroy and the victim while continuing to curse at the victim. In response, McElroy began cursing back at defendant. Lisa also exited defendant's car and began cursing at McElroy. McElroy threatened to fight both defendant and Lisa. McElroy instructed "Dee-Dee," who was standing near the victim's car as well, to retrieve Williams from inside the salon. "Dee-Dee" complied. At that point, McElroy was holding the victim upright while the victim attempted to stand outside her car. Defendant continuously yelled obscenities, including repeatedly using the word "fag." The victim attempted to snap out of her drunken

haze. Neither McElroy nor the victim had anything in their hands at the time.

While defendant continued yelling at the victim, Lisa returned to defendant's vehicle to retrieve something through the open driver's side window. Defendant then walked toward his vehicle and Lisa handed him an object. McElroy could not see the object. Defendant approached the victim and punched her in the chest with a "balled" fist. After striking the victim, defendant back-pedaled and the victim gave chase. When defendant reached an adjacent alley on the north side of 78th Street, he yelled, "I got faggot blood on me." Defendant threw "something" and instructed Lisa to meet him around the corner. McElroy assumed the "something" that was thrown was a set of keys based on the resulting noise when the object hit the ground. Lisa drove away as defendant instructed. Defendant then ran toward 77th Street and Halsted Street.

The victim shouted that she had been stabbed. Williams ran toward the victim and the victim fell in Williams' arms. McElroy ran to the victim's aid as well. The victim struggled to breath and had blood seeping through her shirt. McElroy and Williams removed the victim's shirt and pressed it to her chest. Another individual that was standing outside the salon retrieved towels

which were used to put pressure on the victim's chest. The victim died.

On June 19, 2005, at approximately 2 a.m., McElroy viewed in a lineup and positively identified defendant.

On cross-examination, McElroy testified that she did not know Lisa personally. Lisa had left the salon and returned with defendant. According to McElroy, defendant arrived in his car between 8 p.m. and 8:30 p.m. It was beginning to get dark outside at that point. When defendant punched the victim, the group was standing near the victim's car. While tending to the victim's injury in the alley, McElroy and Williams placed the victim's shirt under her head.

Williams testified that she did not know Lisa before the night in question, but saw her inside the salon. At some point, "Dee-Dee" told Williams that she needed to go outside because McElroy was "fixing to fight." When Williams exited the salon, she saw that McElroy was in a verbal argument with Lisa. McElroy was waving her hands around during the argument. Williams did not see anything in McElroy's hands. Meanwhile, the victim was leaning against her car across the street arguing with someone else. According to Williams, there were approximately 15 to 20 people gathered outside the salon at that time. Williams walked between McElroy and Lisa, who were standing in the middle of the

street in between the parked cars. Williams then saw a man, who she identified in court as defendant, punch the victim in the chest. Williams was approximately 15 to 20 feet away. Williams saw a portion of a silver object in between defendant's fingers as he punched the victim. Williams then saw the knife drop and heard the victim yell, "this motherf***er done stabbed me" as she walked toward the alley. Williams followed the victim toward the alley and caught the victim as she fell to the ground. The victim was not wearing a shirt and had no jewelry on when she collapsed. Williams did not remove the items and did not see them being removed.

Demont Deener testified that he arrived at the salon at 8:30 p.m. on the night in question. Deener's cousin worked at the salon. While inside, Deener saw the victim and noticed she was drunk. Deener left to retrieve some more alcohol and returned at approximately 9 p.m. Deener walked outside and heard commotion. There were approximately five people standing outside of the salon at the time. According to Deener, the victim was inside the salon before he walked outside, but Deener testified that, upon inspecting the commotion, he saw the victim, McElroy, and defendant "jawing" on 78th Street near the alley. Deener saw Williams outside as well and noted "Dee-Dee" was nearby. McElroy walked away from the argument. Deener then saw defendant lunge

at and punch the victim in the chest. After making contact, defendant back-pedaled toward the alley and said, "man, I got fag blood on [my] hands." The victim chased defendant; however, she lost stamina after approximately 10 seconds. As the victim fell to the ground, Williams caught her.

Deener never saw anything in the hands of McElroy or the victim. Defendant ran into the alley past Deener. Deener saw defendant throw "something" that "clinked." Deener could not tell whether the object was a set of keys or the "murder weapon." Deener ran into the salon and informed the people inside that the victim had been stabbed. A crowd exited the salon and the police were called.

Deener went to the police station to participate in a lineup approximately 1.5 hours after the offense. Deener positively identified defendant in the lineup. Deener also provided the police with a statement regarding the events.

Russell Avery testified that he arrived at the salon at 9:20 p.m. on the night in question. When he arrived, Avery noticed commotion outside. As Avery approached the front door of the salon on Halsted Street, a man ran past Avery from 78th Street toward 77th Street. Avery's barber instructed Avery to catch the man. Avery gave chase, running through an empty lot

adjacent to the salon and then across the street into the police parking lot. Avery tripped the man and both fell to the ground. Two officers arrived and arrested the man.

Officer Sylvester Mackey testified he was stationed at the Sixth District on the night in question. At approximately 9:30 p.m., Officer Mackey received a call notifying him that a person was stabbed at the beauty salon located across the street. Upon arriving on the scene, Officer Mackey and his partner attempted to disperse the crowd and secure the crime scene. Angel Wilson, Lisa's cousin, gave Officer Mackey a knife from the scene.

Officer Eric Taylor testified he was near the Sixth District police station at approximately 9:30 p.m. on June 18, 2005. Officer Taylor saw two males run into the police station parking lot. After the male giving chase tackled the individual running ahead, Officer Taylor approached the pair. Simultaneously, Officer Taylor received word that a stabbing had occurred near the salon across the street. Based on that information, Officer Taylor arrested the individual that had been tackled to the ground, who he learned was defendant. While processing defendant, two officers brought Officer Taylor a knife, which he processed and inventoried.

Detective Carlos Cortez observed defendant at the police

station and noticed what looked like blood on the left sleeve of his shirt. Defendant's shirt was taken as evidence and inventoried. Detective Cortez did not observe any blood on defendant's hands.

Officer William Sullivan, a forensic investigator, testified he arrived on the scene at approximately 10:15 p.m. on June 18, 2005. Officer Sullivan described the building in which the salon was located as stretching approximately 150 feet east to west from the alley to the curb of Halsted Street. Officer Sullivan investigated, inventoried, and photographed the scene. Officer Sullivan discovered blood on the north sidewalk of 78th Street and found a white and red shirt and miscellaneous items, including an earring, a one dollar bill, and two rags, in a pool of blood on the northside alley pavement. Officer Sullivan also photographed a 2000 silver Buick with a child seat in the back seat parked southbound on Halsted Street directly adjacent to the police station parking lot. The Buick had blood droplets on the front fender area and the driver's door handle.

The parties agreed to stipulate that, if called, Amber Moss, supervisor at Orchid Cellmark in Dallas, Texas, would testify that DNA profiles were generated for the victim and defendant. The victim's DNA was found in blood samples taken from the knife, the Buick, and the dollar bill. Defendant's DNA was found in the

stain on his shirt.

The parties additionally agreed to stipulate that, if called, Doctor Adrienne Segovia, an assistant medical examiner, would testify that she performed an autopsy on the victim and determined the victim died as a result of a stab wound to the chest with the manner of death being homicide. If called, Doctor Segovia would further testify that the stab wound penetrated through the victim's skin, musculature, and cartilage of two ribs, and then into the heart.

Sheila Daugherty, a forensic scientist, testified as an expert in fingerprint analysis. Daugherty performed several tests on the knife and one dollar bill. Daugherty was unable to detect any suitable latent fingerprints on either item.

Defendant testified that Lisa retrieved him from work at approximately 8:30 p.m. on June 18, 2005. Defendant worked as a car salesman at Bob Watson Chevrolet. The couple's newborn baby and Lisa's cousin, Angel, were also in the car at the time. On their way home, defendant drove Angel to Ford's Salon. After dropping Angel at the salon, defendant drove four or five blocks before Lisa realized that she forgot hair products at the salon. Defendant drove back to the salon. Through the open window, Lisa asked Angel, who was standing outside, to retrieve the hair products. Defendant parked the car on the north side of 78th

Street.

Defendant noticed the victim sitting in the passenger seat of a parked car. A man was seated in the driver's seat of the car and a woman was standing outside the car talking to the man. Defendant had known the victim for two and a half or three years, but did not know the other individuals. Defendant described the victim as a close friend to Lisa's family. Defendant said the victim and Lisa were social friends.

After parking his car, defendant got out and walked across the street toward the victim because defendant previously learned she was interested in purchasing a car. Defendant gave the victim his business card and invited her to visit the dealership on Monday morning. Defendant advised the victim to bring someone along in the event she needed a cosignor. Defendant, however, instructed the victim not to bring "Ira," who defendant believed was the victim's boyfriend, because of prior negative interactions with him.

At that point, the woman that had been having a conversation with the man on the driver's side approached the passenger side of the vehicle inquiring, in an antagonistic manner, about defendant and the victim's conversation. A crowd began to gather as the woman used profanity and became louder and louder during their conversation. Lisa, who had remained in the car until this

point, exited the car and approached to investigate the commotion. The victim and the man in the driver's side then exited the car and joined the argument as well, in addition to another woman that walked over from the salon. Lisa returned to their car to turn off the engine and retrieve the keys. The baby remained in the car. Lisa gave the keys to defendant.

According to defendant, the argument started "to get very heated" and he responded to repeated insults and threats by saying, "f*** you, you ugly faggot." The victim began shouting and removed her shirt and earring, yelling "I'm going to f*** you up." The victim balled up her fist and pulled it back as if she was going to hit Lisa. In response, defendant grabbed the victim. The victim then appeared as if she was going to hit defendant; however, someone stood between defendant and the victim to break them apart. Several other people were now standing around observing the argument. Defendant noticed that one of the observers standing approximately five feet away was carrying a knife.

Defendant became scared and instructed Lisa that they needed to leave the area, saying the crowd was full of drunk people. Lisa moved toward their car and defendant began back-pedaling because he was afraid he might be struck in the back if he turned around. According to defendant, the crowd had been taunting

those involved in the argument to "kick [defendant's] a** *** he doesn't know where he is at." While back-pedaling toward his car, defendant noticed the victim was now holding the knife. The victim walked toward defendant saying, "I'm fittin' to butcher you you b****." The other three people involved in the argument were also moving toward defendant.

When defendant was about one or two feet from his car, he attempted to reason with the victim. While defendant was reaching for the car door handle, the victim spit in his face and maintained a "boxing" position with the knife in one of her hands. The victim leaned toward defendant and jabbed at defendant's left arm causing a "slight nick." The strike caused a superficial cut and some minor bleeding. Defendant responded by grabbing the victim's wrists and shoving her as hard as possible in an attempt to bring the victim to the ground. When defendant shoved the victim, the knife in the victim's hand punctured her chest. The victim removed the knife from her chest and continued toward defendant. The rest of the group proceeded toward defendant as well. In response, defendant threw the car keys to his wife instructing her to flee, and defendant ran around the salon and across the street to the police station to obtain help for the victim.

On cross-examination, defendant testified he felt threatened

by the woman that initially interrupted his conversation with the victim. Defendant, however, did not seek assistance from the adjacent police station or anyone in the salon nor did he attempt to escape in his car at that point. Defendant continued to feel threatened when the victim exited the car and removed her shirt.

The jury found defendant guilty of second degree murder. The trial court denied defendant's motion for a new trial based on a sufficiency of the evidence argument. The trial court later sentenced defendant to 16 years' imprisonment. The trial court denied defendant's motion to reconsider that sentence. This appeal followed.

DECISION

I. Sufficiency Of The Evidence

Defendant contends the State failed to prove defendant guilty of second degree murder beyond a reasonable doubt where the witnesses' testimony was inconsistent, implausible, and impeached, and the physical evidence supported defendant's testimony that he acted in self defense.

When reviewing a challenge to the sufficiency of the evidence, we must determine "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 crime beyond a reasonable doubt." (Emphasis in the original.) *Jackson v. Virginia*, 443 U.S. 307, 319, 61 L. Ed. 2d 560, 573, 99 S. Ct. 2781, 2789 (1979). It is not the reviewing court's function to retry the defendant or substitute its judgment for that of the trial court. *People v. Evans*, 209 Ill. 2d 194, 209, 808 N.E.2d 939 (2004). The trial court assesses the credibility of the witnesses, determines the appropriate weight to be given to the testimony, and resolves conflicts or inconsistencies in the evidence. *Id.* at 211. In order to overturn the trial court's judgment, the evidence must be "so unsatisfactory, improbable or implausible" to raise a reasonable doubt as to the defendant's guilt. *People v. Slim*, 127 Ill. 2d 302, 307, 537 N.E.2d 317 (1989).

A defendant is guilty of first degree murder when the State proves beyond a reasonable doubt that, in performing the acts which cause the death of an individual:

> "(1) he either intends to kill *** that individual ***, or knows that such acts will cause death to that individual ***; or
> (2) he knows that such acts create a strong probability of death *** to that individual ***; or

(3) he is attempting or committing a forcible felony other than second degree murder." 720 ILCS 5/9-1(a)(1)-(3) (West 2004).

A defendant is guilty of second degree murder when he or she commits first degree murder, but a mitigating factor exists. 720 ILCS 5/9-2(a) (West 2004). The potential mitigating factors are that, at the time of the killing, the defendant either: (1) acted under a sudden and intense passion resulting from serious provocation, but negligently or recklessly caused the death; or (2) had an unreasonable belief that circumstances existed that justified his killing the victim. 720 ILCS 5/9-2(a)(1), (a)(2) (West 2004). Once the State has proven the elements of first degree murder beyond a reasonable doubt, the burden shifts to the defendant to show by a preponderance of the evidence that a mitigating factor exists. *People v. Hawkins*, 296 Ill. App. 3d 830, 836, 696 N.E.2d 16 (1998).

After reviewing the record, we conclude the evidence supported the jury's verdict. Testimony from a single eyewitness is sufficient to support a conviction. *People v. Piatkowski*, 225 Ill. 2d 551, 566, 830 N.E.2d 467 (2007). McElroy, Williams, and Deener all testified that defendant and the victim engaged in a verbal argument which concluded when defendant lunged at the victim and punched her in the chest. The victim shouted that she

had been stabbed. Defendant back-pedaled away and the victim attempted to follow, but shortly collapsed near the mouth of the alley on 78th Street. McElroy and Deener testified that the victim did not have anything in her hands during the argument. Williams, however, testified that she saw defendant with a knife in between his fingers prior to punching the victim. Williams and Deener testified that defendant threw an object from his hand after the victim's stabbing. Williams testified that defendant dropped the knife. A knife containing the victim's blood, and only the victim's blood, was recovered. McElroy and Deener both testified that defendant said he had "faggot blood" on him before fleeing. Defendant was caught by Avery and arrested in the police parking lot.

Defendant similarly testified to the general events that took place. Defendant said he approached the victim's car. A verbal argument ensued shortly thereafter between McElroy, the victim, defendant, and Lisa, who had exited their car to join the argument. A crowd gathered outside the salon during the argument. At some point, Lisa retrieved something from their car and handed the item to defendant. The argument became progressively more heated, during which defendant made homophobic statements. Ultimately, defendant lunged at the victim and

caused a knife to penetrate the victim's chest.

Defendant highlights the following alleged inconsistencies: when and where the victim's shirt and earring were removed; the exact timing of the events in question; the exact location of the witnesses, defendant, and the victim when the stabbing occurred; the exact number of people standing outside the salon witnessing the fight; the fact that no blood was found on defendant's hands despite Williams' testimony that he was holding the knife between his fingers; and McElroy's and Deener's failure to provide accurate police statements regarding defendant's statement that he had "faggot blood" on him. It was the duty of the trier of fact to assess witness credibility, weigh the testimony, draw reasonable inferences, and resolve conflicts or inconsistences in the evidence. *Evans*, at 209; *People v. Felella*, 131 Ill. 2d 525, 534, 546 N.E.2d 492 (1989). We will not reweigh the testimony presented before the jury. *Id.* at 534-35.

Overall, after hearing the evidence, the jury determined that a mitigating factor existed such that defendant was guilty of the lesser mitigated offense of second degree murder. The jury was free to reject defendant's version of the events in which, in self defense, he forced the victim to stab herself and she removed the knife from her own chest. We conclude the evidence was not so unsatisfactory, improbable, or implausible to

raise a reasonable doubt as to defendant's guilt.

II. Rule 431(b) Error

Defendant contends the trial court failed to strictly comply with the dictates of Rule 431(b) and he is entitled to a new trial as a result. Defendant concedes that he failed to preserve the alleged error for our review. *People v. Enoch*, 122 Ill. 2d 176, 186, 522 N.E.2d 1124 (1988) (a defendant forfeits appellate review where he fails to object to the alleged error at trial and fails to include it in a posttrial motion). Defendant, however, urges this court to review the error under the plain error analysis. The State contends any error was harmless.

We first must determine whether any error occurred. *People v. Hudson*, 228 Ill. 2d 181, 191, 886 N.E.2d 964 (2008). Construction of a supreme court rule is reviewed *de novo*. *Robidoux v. Oliphant*, 201 Ill. 2d 324, 332, 775 N.E.2d 987 (2002).

Supreme Court Rule 431(b) codified our supreme court's holding in *People v. Zehr*, 103 Ill. 2d 472, 477, 469 N.E.2d 1062 (1984). The rule was amended effective May 1, 2007, placing a *sua sponte* duty on trial courts to ensure compliance with the mandates of Rule 431(b). *People v. Thompson*, 238 Ill. 2d 598, 607, 939 N.E.2d 403(2010). The amended rule provides:

> "The court *shall ask* each potential juror,

individually or in a group, whether that juror *understands and accepts* the following principles: (1) that the defendant is presumed innocent of the charge(s) against him or her; (2) that before a defendant can be convicted the State must prove the defendant guilty beyond a reasonable doubt; (3) that the defendant is not required to offer any evidence on his or her own behalf; and (4) that the defendant's failure to testify cannot be held against him or her; however, no inquiry of a prospective juror shall be made into the defendant's failure to testify when the defendant objects.

The court's method of inquiry *shall provide* each juror an *opportunity to respond* to specific questions concerning the principles set out in this section." (Emphasis added.) Ill. S. Ct. R. 431(b), eff. May 1, 2007.

Prior to conducting *voir dire*, the trial court instructed the potential jurors that:

"It is absolutely essential as we select this jury that each of you understand and embrace these fundamental principles; that is, that all persons charged with a crime are presumed to be innocent and

that it is the burden of the State who has brought the charges to prove the Defendant guilty beyond a reasonable doubt.

What this means is that the Defendant has no obligation to testify on his own behalf or to call any witnesses in his defense. He may simply sit here and rely upon what he and his lawyer perceive to be the inability of the State to present sufficient evidence to meet their burden. Should that happen, you will have to decide the case on the basis of the evidence presented by the prosecution.

The fact that the Defendant does not testify must not be considered by you in any way in arriving at your verdict. However, should the Defendant elect to testify or should his lawyer present witnesses on his behalf, you are to consider that evidence in the same manner and by the same standards as the evidence presented by the state's attorneys. The bottom line, however, is that there is no burden upon the Defendant to prove his innocence. It's the State's burden to prove him guilty beyond a reasonable doubt."

While individually questioning each impaneled juror, the court asked, in some form, "if the state's attorneys prove the

Defendant guilty beyond a reasonable doubt, will you sign a guilty verdict form?" The court further asked, in some form, "on the other hand, if you think they did not meet their burden, will you sign a not guilty verdict form?" Six jurors were individually asked whether they understood and agreed that defendant is presumed innocent and the State has the burden of proving defendant guilty of the charges beyond a reasonable doubt. All six jurors responded in the affirmative. Six additional jurors were asked in groups whether they understood and accepted the presumption of innocence and the State's burden of proof. The record, however, demonstrates that four of the six jurors responded in the affirmative. The record demonstrates that two of the six jurors were not given an opportunity to respond to the court's inquiry.

At the close of evidence, the jurors were reminded of defendant's presumption of innocence, the State's burden of proof, and that defendant did not have to present any evidence on his behalf.

We find the trial court erred in failing to secure the two impaneled jurors' understanding and acceptance regarding defendant's presumption of innocence and the State's burden of proof. We further find the trial court erred in failing to

question and secure the understanding and acceptance from any impaneled jurors regarding the principles that defendant was not required to present any evidence on his behalf and his decision not to testify could not be used against him. In *Thompson*, the supreme court advised:

> "Rule 431(b), therefore, mandates a specific question and response process. The trial court must ask each potential juror whether he or she understands and accepts *each* of the principles in the rule. The questioning may be performed either individually or in a group, but the rule requires an opportunity for a response from each prospective juror on their understanding and acceptance of those principles." (Emphasis added.) *Thompson*, 238 Ill. 2d at 607.

The trial court's lack of compliance with Rule 431(b) constitutes error.

This court may review forfeited errors under the doctrine of plain error in two narrow instances:

> "First, where the evidence in a case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, a reviewing court may consider a forfeited error in order

> to preclude an argument that an innocent person was wrongly convicted. [Citation.] Second, where the error is so serious that defendant was denied a substantial right, and thus a fair trial, a reviewing court may consider a forfeited error in order to preserve the integrity of the judicial process." *People v. Herron*, 215 Ill. 2d 167, 178-79, 830 N.E.2d 467 (2005).

Once it is determined that an error occurred at trial, the burden is on the defendant to establish plain error. *Thompson*, 238 Ill. 2d at 613.

Defendant challenges the trial court's error under both prongs of plain error. We take each one in turn.

To establish that the evidence was closely balanced, a defendant must demonstrate the outcome may have been affected by the trial court's errors. See *People v. White*, No. 1-08-3090, slip op. at 11 (January 7, 2011). Although defendant contends the evidence was not sufficient to support his conviction, we recognize that the question of whether the evidence is closely balanced is distinct from a sufficiency of the evidence challenge. *People v. Piatkowski*, 225 Ill. 2d 551, 566, 830 N.E.2d 467 (2007).

Following our review of the evidence, we conclude that defendant has not met his burden. Three witnesses and defendant

himself testified that he and the victim engaged in a heated verbal argument which became physical. McElroy, Williams, and Deener further testified that defendant punched the victim in the chest and then fled after the victim announced that she had been stabbed. Moreover, the trial court's failure to secure the jury's understanding and acceptance that defendant had no responsibility to present evidence and that his failure to testify could not be used against him was of no consequence because defendant did testify and offered evidence by way of stipulation. The evidence was not closely balanced, and, therefore, does not amount to a first-prong plain error exception.

In regard to second-prong plain error, defendant has failed to provide any evidence demonstrating that the jury was biased. In *Thompson*, the supreme court clarified that a Rule 431(b) violation does not amount to second-prong plain error unless it can be shown that the error is structural. *Thompson*, 238 Ill. 2d at 613-14. Therefore, a defendant must demonstrate that the jury was biased in order to establish that his right to a fair trial and the integrity of the judicial process were affected. *Id*. at 614. Consequently, defendant has failed to establish second-prong plain error.

III. Prosecutorial Misconduct

Defendant contends he was denied a fair trial where the State engaged in prosecutorial misconduct during rebuttal argument. In particular, defendant contends the State misstated the evidence, inflamed the passion of the jury, and misstated the law. Defendant recognizes that he failed to object to some of the challenged comments and did not include any of the errors in his posttrial motion. Defendant, however, contends this court may review the errors despite forfeiture under the doctrine of plain error.[2]

First, we must determine whether any error occurred. *Hudson*, 228 Ill. 2d at 191.

It is well established that a prosecutor is given wide latitude in making a closing argument. *People v. Nicholas*, 218 Ill. 2d 104, 121, 842 N.E.2d 674 (2005). A prosecutor may comment on the evidence and any reasonable inferences drawn therefrom. *Id*. A closing argument must be reviewed in its

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[2]Defendant additionally argues that his counsel was ineffective for failing to object to the errors and include them in a posttrial motion. Defendant's argument is cursory at best and contains absolutely no analysis in violation of Supreme Court Rule 341(h)(7) (210 Ill. 2d R. 341(h)(7)). Consequently, the argument is waived. *People v. Ward*, 215 Ill. 2d 317, 332, 830 N.E.2d 556 (2005).

entirety and the challenged remarks must be observed within context. *Id*. at 122. Challenged comments made during rebuttal argument will not be considered improper if they were provoked or invited by the defense. *Evans*, 209 Ill. 2d at 225.

Defendant points to three instances where the State misstated the evidence. After considering these challenged remarks in context, we find they were based on the evidence presented at trial, reasonably inferred from the evidence, or invited by the defense.

The first challenged remark was made after the State discredited defendant's testimony that the victim's stabbing resulted from defendant shoving the victim's own hand into her chest. The State continued, "Sydney did not kill herself. And you know why also we know that Sydney did not kill herself? Because we have the medical examiner's report. And the medical examiner found that [the victim] died as a result of a homicide. She didn't say suicide." The court overruled defendant's objection. We find the comments were primarily based on the evidence and reasonable inferences drawn therefrom. McElroy, Williams, and Deener all testified that, after defendant punched the victim in the chest, they learned that she had been stabbed. Defendant himself confirmed the victim did not commit suicide because he pushed the victim's hand into her chest. The medical

examiner further stated that the knife punctured the victim's skin and musculature then proceeded through two ribs and ultimately pierced her heart.

Moreover, we find the comments were in response to defense counsel's statements during closing argument. Specifically, defense counsel argued, "[the State's witnesses] want to see, you know, [the victim's] death avenged here even if [she] maybe brought it partially upon [herself] by [her] conduct." Defense counsel added, "[defendant's] unimpeached testimony is that he pushed someone with a knife back and that person stabbed themselves. He did that because he was trying to knock that person down so that he could get away." The State's rebuttal was, therefore, provoked by defense counsel's unsupported insinuation that the victim was responsible for her own death.

The second challenged remark was the State's comment that there was no slash mark found on defendant's shirt. In context, the comment was rendered in response to defense counsel's repeated reliance on the fact that blood was found on defendant's shirt to support defendant's testimony that the victim stabbed him in the arm, and defense counsel's insinuation that the State was hiding evidence of such. The State posited that a circle containing the blood was cut from defendant's shirt in order to obtain a DNA sample. The State admitted that the circle was not

in evidence. The State did not say or even allude that the circle of fabric that was removed from the shirt did not contain a slash mark or puncture of some sort. Rather, the State simply highlighted the fact that no other such marks were found on the remaining shirt. Consequently, we find the State's remark was based on the evidence and an invited response to defense counsel's comments.

The third challenged remark at issue was the State's comment that "[w]ell, the blood on the car, small little droplets. And you heard the witnesses say that the defendant threw something. That's consistent with the defendant throwing the knife, the blood from the knife flicking." The State's remarks, once again, were based on inferences drawn from the evidence and were directly in response to defense counsel's closing argument. Two of the State's witnesses testified that defendant threw an object after punching the victim in the chest and a third witness, Williams, expressly testified that defendant dropped a knife. In responding to defense counsel's argument that the State's witnesses were impeached by their testimony that the stabbing occurred near the victim's car when the victim's blood was found on defendant's car, the State inferentially argued based on the testimony.

None of the three evidentiary comments challenged by

defendant were misrepresentations. We, therefore, find no error.

Defendant next contends the State made two comments that improperly inflamed the passion of the jury.

Defendant argues the State attempted to inflame the passion of the jury when it said the State's burden of proof was "the same burden for murder, as it would be for rape, as it would be for murder of a small child. It is the same burden." While in poor taste, we cannot say the remark was made to inflame the passion of the jury. In context, the remark arose while the State reminded the jury it was the State's burden to prove beyond a reasonable doubt that defendant was guilty of first degree murder. The State further explained that, because of that burden, it was entitled to a rebuttal argument. This remark was in direct response to defense counsel's repeated comments that he was only entitled to argue once. We find the State's remarks did not rise to the level of error. *Cf. People v. Tiller*, 94 Ill. 2d 303, 321, 447 N.E.2d 174 (1982) (the prosecutor's comparison of the murders to the Holocaust erroneously inflamed the passion of the jury, although the error was not reversible).

Defendant also takes issue with the State arguing that "[defendant] said that [his wife] handed him something, but he was saying it was his keys and that he was so fearful. And he kept saying on cross examination, you know, it's a really bad

neighborhood. It's really a bad neighborhood. I don't know. Quite frankly, that's quite insulting." The trial court overruled defense counsel's objection to the comment. Reviewing the challenged remark in context demonstrates the State was attempting to discredit defendant's testimony that the neighborhood where his wife received salon services and he brought his newborn child was unsafe. The State's remark that defendant's testimony was "quite insulting" did not express a personal belief but, rather, was dismissive of defendant's testimony as being insulting to one's intelligence in light of the surrounding circumstances. We find the State's remarks were not intended to inflame the passion of the jury.

We conclude the State did not make improper comments directed at inflaming the passion of the jury.

Defendant additionally contends the State erred in misstating the law on two occasions.

Defendant argues the first misstatement occurred when the State posited that "there is no self defense. Nobody was harmed." Prior to and after making the challenged statement, the State discussed its burden of proving defendant committed first degree murder. In context, therefore, the challenged comment insinuates that a defendant must be harmed in order to successfully establish self defense. This is not a correct

statement of the law. See *People v. Young*, 347 Ill. App. 3d 909, 920, 807 N.E.2d 1125 (2004) (to prove self defense, a defendant must demonstrate unlawful force was threatened against him; danger of harm was imminent; he was not the aggressor; the use of force was necessary; he actually and subjectively believed a danger existed making the force applied necessary; and his beliefs were reasonable). The State's comment was improper.

The State concedes that the second challenged remark was a misstatement of the law where it said, "And this defendant is presumed innocent, and that presumption runs throughout the trial. But the trial is over, and that cloak of presumption is off. He is not presumed truthful."

We previously determined the evidence was not closely balanced; therefore, in order for the improper comments to amount to reversible error, defendant must establish second-prong plain error. Defendant has not done so because the record does not reveal that, absent the erroneous comments, the jury would have reached a different result. See *People v. Robinson*, 157 Ill. 2d 68, 84, 623 N.E.2d 352 (1993) (improper comments must have been a material factor in the defendant's conviction in order to require reversal). The comments were isolated to those instances at issue. See *People v. Toney*, 337 Ill. App. 3d 122, 149, 785 N.E.2d 138 (2003). The fact that the State should have known

better than to erroneously refer to the presumption of innocence does not demonstrate resulting prejudice. Moreover, the jury was properly instructed on the law, including the elements of self defense and that defendant's presumption of innocence remains throughout deliberations. In addition, the jury was instructed that closing statements were not evidence, that any arguments not based on the evidence should be disregarded, and that the law, as given by the court, was to be applied to the facts. In general, counsel's arguments carry less weight with the jury than the instructions provided by the court. *People v. Lawler*, 142 Ill. 2d 548, 564, 568 N.E.2d 895 (1991), citing *Boyde v. California*, 494 U.S. 370, 108 L. Ed. 2d 316, 110 S. Ct. 1190 (1990). We, therefore, conclude that defendant has failed to establish second-prong plain error.

IV. Excessive Sentence

Defendant contends the trial court considered improper aggravating factors when fashioning defendant's sentence, namely, that defendant caused serious harm to the victim, that defendant's sentence was a necessary deterrent, and that defendant committed the offense due to the victim's sexual orientation.

At the outset, we note the State contends defendant failed to preserve his contention for our review. See *Enoch*, 122 Ill.

2d at 186 (a defendant must both object to the alleged error before the lower court and include it in a posttrial motion). Although the record reveals defendant did not object at his sentencing hearing, he did file a motion to reconsider the sentence arguing that his prison term was excessive. Waiver is a limitation on the parties. *People v. Carter*, 209 Ill. 2d 309, 318-19, 802 N.E.2d 1185 (2003). We will review defendant's contention.

A trial court's sentence may not be disturbed absent an abuse of discretion. *People v. Perruquet*, 68 Ill. 2d 149, 154, 368 N.E.2d 882 (1977). A sentence must be balanced between the seriousness of the offense at issue and the potential for the defendant's rehabilitation. See Ill. Const. 1970, art. I, §11. A trial court's sentence is entitled to great deference and weight because the trial court is in a superior position to make such a determination. *Perruquet*, 68 Ill. 2d at 154. The trial court weighs the defendant's credibility, demeanor, general moral character, mentality, social environment, habits, and age. *People v. Stacey*, 193 Ill. 2d 203, 209, 737 N.E.2d 626 (2000). A reviewing court may not substitute its judgment for that of the trial court simply because it would have weighed those factors differently. *Id.* Moreover, a sentence within the statutory limits will not be considered excessive unless it greatly varies

with the spirit and purpose of the law or is manifestly disproportionate to the nature of the offense. *Id.* at 210.

A second degree murder conviction carries a sentence of not less than 4 years and not more than 20 years. 730 ILCS 5/5-8-1(a)(1.5) (West 2004). Defendant's 16-year sentence, therefore, falls within the permissive statutory range.

In addition, the record establishes that the trial court considered both the seriousness of the offense committed and defendant's potential for rehabilitation. At sentencing, the trial court carefully considered factors in mitigation and aggravation. In mitigation, the court found defendant acted under strong provocation; that there were substantial grounds to excuse or justify defendant's criminal conduct despite failing to provide a defense; that he had a minimal criminal record; and that his criminal conduct resulted in circumstances unlikely to recur. In aggravation, the court found that defendant's conduct caused or threatened serious harm; that a sentence was necessary for deterrence purposes; and that "by reason of another individual's actual or perceived race, color, creed, religion or sexual orientation, physical or mental disability or national origin, defendant committed offense against the person or property of that individual."

Defendant contends the trial court impermissibly considered

the fact that he caused the victim harm, which was implicit in the offense charged. Defendant cites *People v. Saldivar*, 113 Ill. 2d 256, 497 N.E.2d 1138 (1986), to support his argument.

In *Saldivar*, the supreme court determined the trial court abused its discretion where it primarily relied on the fact that the victim died, which was implicit in the offense of second degree murder,[3] in positing a more severe sentence. *Id.* at 271. The supreme court, however, provided that "the degree or gravity of the defendant's conduct, *i.e.*, the force employed and the physical manner in which the victim's death was brought about or the nature and circumstances of the offense, including the nature and extent of each element of the offense as committed by the defendant" were permissible considerations. *Id.* at 271.

The record demonstrates that, in reading the statutory aggravating factors pursuant to section 5-5-3.2 in Unified Code of Corrections (Code) (730 ILCS 5/5-5-3.2 (West 2004)), the court merely stated that the aggravating factor in which "defendant's conduct caused or threatened serious harm" was applicable. The trial court did not elaborate further on the specific factor. Most importantly, the trial court never mentioned the victim's death. Instead, after listing all of the aggravating factors and

[3]At the time *Saldivar* was decided, the offense was known as voluntary manslaughter.

their applicability, the court said, "I don't assign any greater weight to any one of these factors in aggravation than another. I try to take them in as a whole and try to fashion the appropriate sentence." The record, therefore, does not demonstrate that the court attached any meaningful significance to an impermissible factor.

Defendant next contends the trial court improperly considered the aggravating factor of deterrence of others where he did not introduce the knife into the incident.

In *People v. Behl*, 279 Ill. App. 3d 1071, 666 N.E.2d 357 (1996), the Fourth District provided the following reasoning in support of the conclusion that deterrence is a proper aggravating consideration for the offense of second degree murder:

> "Thus, in order to be convicted of second degree murder, a defendant who has one of the appropriate mitigating factors present must *also* have acted with either the intent or knowledge his conduct would likely kill the victim. A belief or a passion might be undeterrable, but the *voluntary choice* to then act upon that belief or passion and use deadly force *is* deterrable. In other words, although the mitigating factors in second degree murder are undeterrable, the offense itself is. A trial court may properly consider

> the need for such deterrence in sentencing a defendant who has been convicted of second degree murder." (Emphasis in original.) *Id.* at 1075.

In our case, it is, therefore, of no import whether defendant introduced the knife into the altercation. Defendant ultimately decided to use the knife to kill the victim. That decision is deterrable. Consequently, the trial court properly considered the deterrence of others as an aggravating factor.

Defendant finally contends the aggravating factor involving the victim's sexual orientation could not be considered because the jury and the trial court found he acted under serious provocation, not because of the victim's sexual orientation.

In determining the aggravating factor was applicable, the court said:

> "The victim in this case was according to the testimony as a minimum bisexual, undergoing some type of hormone treatment or something like that to change his sex.
>
> There was evidence in the case that the defendant uttered certain words both before and after the killing that indicated that there was a hate crime angle to the case, even though he wasn't actually charged with that. So there were some--I don't think any of the other

factors, I think that based on the evidence, the factor in aggravation is applicable."

Defendant fails to cite any authority to support his contention that the trial court erred. Failure to cite to relevant authority is a violation of Supreme Court Rule 341(h)(7) resulting in waiver. 210 Ill. 2d R. 341(h)(7). Waiver aside, as discussed above, a court may consider that defendant voluntarily acted on the sudden and intense belief or passion, which in this case was fueled by the victim's sexual orientation as demonstrated by defendant's admitted homophobic slurs.

We conclude the trial court did not abuse its discretion in fashioning defendant's sentence.

CONCLUSION

In sum, the State proved defendant guilty beyond a reasonable doubt of second degree murder where the evidence demonstrated, after they engaged in a heated argument, defendant punched the victim in the chest with a knife causing a fatal wound. In addition, although the trial court erred in failing to follow the dictates of Rule 431(b), defendant failed to establish the errors were reversible. Moreover, all but two of the challenged rebuttal comments made by the State were proper. The two improper comments did not amount to reversible error. Finally, the trial court's sentence was not an abuse of

discretion.

Accordingly, we affirm defendant's conviction and sentence, finding any errors committed at trial were harmless.

Affirmed.