

No. 1-10-1378

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 14184
	)	
LARRY CARTER,	)	Honorable
	)	Rosemary Higgins-Grant,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE ROCHFORD delivered the judgment of the court.  
Presiding Justice Hoffman and Justice Karnezis concurred in the judgment.

**ORDER**

¶ 1 *Held:* We affirmed defendant's conviction of first degree murder and his sentence of 55 years' imprisonment where the trial court committed no error in refusing to instruct the jury on involuntary manslaughter, his trial counsel provided effective assistance, and the State's comments during closing arguments did not deprive him of a fair trial.

¶ 2 A jury convicted defendant, Larry Carter, of first degree murder and found that during the commission of the murder, he had personally discharged a firearm that proximately caused the victim's death. The trial court sentenced him to 25 years' imprisonment for first degree murder and 30 years' imprisonment for personally discharging the firearm, for an aggregate of 55 years in prison.

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On appeal, defendant contends: (1) the trial court erred by refusing to instruct the jury on involuntary manslaughter; (2) his trial counsel provided ineffective assistance by failing to request a self-defense instruction; and (3) the State deprived him of a fair trial by making improper remarks during closing arguments. We affirm.

¶ 3 At trial, Khalid Crockerhan testified he was 34 years old and had been a hairstylist for 20 years. He had two prior felony convictions, one in 2005 for possessing a shotgun and one in 2001 for possession of cannabis. Khalid had known defendant since middle school and he had known the victim, Howard Williams, for 20 years. The victim was one of Khalid's best friends.

¶ 4 Khalid testified that just before 2 a.m. on June 2, 2005, he and defendant went to Khalid's sister's (Cassandra's) house on 68th and Green Streets. Khalid's brother, Malachi, and the victim also came over to the house. They stayed for about 10 minutes, and then Khalid, Malachi, defendant, and the victim left the house and entered the victim's car, a black Chrysler Concorde. They drove to a liquor store, but it was closed. Then they went to a "boot legger," a person who sells liquor "after hours." They were unable to purchase any liquor from him either. Then they went to a lounge on 75th Street, where a friend bought them all a drink and the victim bought a pint of vodka.

¶ 5 Khalid testified that after leaving the lounge, they drove to the victim's house in the Englewood area and went inside. They drank and listened to music. At about 4 a.m., Khalid told the victim he wanted to leave because he had to get home to help his mom move. They all left the victim's house and entered his car. The victim was in the driver's seat, Khalid was behind him, Malachi was in the front passenger's seat, and defendant was in the back passenger's seat next to Khalid. They drove to Khalid's girlfriend's car, which he had left at 68th and Peoria Streets. They

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said their goodbyes to each other, and then Khalid reached for the door handle. From inside the car, Khalid saw a blue flash and heard a boom which he knew was a gunshot. Khalid saw the victim's head "go forward and come back."

¶ 6 Khalid testified that out of the corner of his eye, he saw a hand holding "a chrome piece." The chrome piece was "coming down from where [the victim] was sitting at." Khalid jumped out of the car and began screaming at defendant, "[w]hat did you do? What is you doing?" Defendant exited the car. Then defendant came around the back of the car, opened up the driver's side door, grabbed the victim under his shoulders, and put him on the ground. Defendant jumped back in the car, looked at Khalid and Malachi, and said, "[c]ome on." Khalid did not respond; defendant sped off.

¶ 7 Khalid testified he stood for 15 or 20 minutes in a daze. Then he turned around and looked for Malachi, but he was gone. Khalid drove to Cassandra's house and went inside, where he saw Malachi. Khalid began screaming that defendant had just killed the victim and that someone should call the police. Khalid remembered he had given defendant a set of his keys earlier that evening so that defendant could use Khalid's car to go pick up his girlfriend. Khalid then drove to his own home, about two or three blocks away, and woke up his girlfriend Quiana Poindexter, who was also the mother of his children. Khalid told Ms. Poindexter that defendant had killed the victim and that defendant had keys to the house. Khalid told her to get the kids up and dressed. They drove to Ms. Poindexter's mother's home and, once there, Khalid called the police.

¶ 8 Khalid testified that before the police arrived, defendant called his cell phone. Defendant told Khalid he was sorry that Khalid "had to see that." Khalid asked defendant why he had killed

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the victim. Defendant replied that he had killed the victim because he was "hungry." Defendant also asked Khalid not to tell anybody about the shooting and he asked if Khalid wanted his keys back. Although Khalid replied affirmatively, they did not make any arrangements for Khalid to pick up his keys.

¶ 9 Khalid testified that after the phone conversation with defendant, the police arrived and took him to the police station, where he spoke with police and with an Assistant State's Attorney. Khalid gave the police his cell phone, which they later returned to him. Khalid testified that when he spoke to the police, he was in the same condition as he was when at Cassandra's home: hysterical, screaming, and crying.

¶ 10 On cross examination, Khalid testified that defendant was not the victim's "enemy" and that during the hours preceding the shooting, defendant did not get into a fight with the victim. Khalid testified that although he was friends with defendant, they were not close. Khalid denied that defendant owed him any money.

¶ 11 Malachi Crockerhan testified he was 33 years old and had two convictions in 1998 for possession of a controlled substance with intent to deliver. He had known the victim since fourth or fifth grade and he considered the victim to be like a brother. He had known defendant for 10 or 15 years.

¶ 12 Malachi testified he arrived at Cassandra's house at about 1:45 a.m. or 2 a.m. on June 2, 2005. Khalid and defendant were already there; the victim arrived thereafter. The victim had a drink in his hand and suggested they all go out and get another drink somewhere. They agreed, and so the victim drove Malachi, Khalid, and defendant to some liquor stores and to a few bootleggers. They

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were unsuccessful in procuring alcohol from the liquor stores or bootleggers, so then they went to a lounge where one of Khalid's friends offered them all a drink. The victim went to the bar and bought a pint of vodka, and then he drove them to his house, where they played music and drank the vodka. After about 30 or 40 minutes, everyone left. They got into the victim's car. The victim was driving, Malachi was in the front passenger's seat, defendant and Khalid were in back. Malachi testified that when they all got into the car, defendant said to Malachi, "[y]ou lucky that's your guy, or I get him." Malachi testified that despite defendant's threat, he did not believe defendant was going to harm the victim, and he was unaware of any problems between defendant and the victim that evening.

¶ 13 Malachi testified that the victim drove them to Khalid's car at 68th and Peoria Streets. Malachi shook the victim's hand and told him that they would talk later. As Malachi opened the passenger's side door to exit the vehicle, he heard a gunshot and saw the victim's head move backward and then forward in a slumped position. Malachi saw defendant's "arm coming back" and that defendant was holding a "chrome silver" revolver. Prior to the shooting, Malachi had been unaware that defendant was in possession of a gun that evening.

¶ 14 Malachi testified he jumped out of the car, became hysterical and started screaming. He saw defendant exit the car. Malachi and Khalid screamed at defendant, "[w]hy you do this? It's my guy. What's wrong? Why you do this?" Defendant did not respond. Instead, he went over to the driver's seat and pulled the victim out of the car and laid him down on the street. Defendant said something to Khalid which Malachi was unable to hear, and then defendant sped off.

¶ 15 Malachi testified he stood there for a few seconds and then he walked to Cassandra's house.

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Inside the house, Malachi screamed that defendant had just killed the victim. Cassandra called the police. Khalid came in and out of the house. After Khalid left, Malachi continued to be "hysterical." He got on a train and went to Aurora, Illinois, where Shalonda, the mother of his son, met him. He told her about the shooting and, eventually, Shalonda drove him back to Cassandra's house, where he met with detectives who took him to the police station. At the police station, Malachi spoke with police and with an Assistant State's Attorney.

¶ 16 On cross examination, Malachi testified he noticed no animosity between defendant and the victim on the evening of the shooting, nor was there any animosity between defendant and Khalid. Malachi testified Khalid did not have a gun on him that evening. When defendant took the victim out of the car after the shooting, defendant did not go through the victim's pockets or take anything from the victim.

¶ 17 Quiana Poindexter testified that during the early morning hours of June 2, 2005, Khalid Crockerhan, whom she was dating at that time, came over to her house and woke her up. He was crying and hysterical. She gathered her children and then they all went to Ms. Poindexter's mother's house, where Khalid called the police. Khalid was so upset that the officers could not understand what he was saying and they took him to the police station. On cross examination, Ms. Poindexter testified that when Khalid came to her house in the early morning of June 2, 2005, he told her his friend had been killed. On recross examination, Ms. Poindexter testified Khalid had told her that he saw defendant shoot his friend.

¶ 18 The parties stipulated that if called to testify, Doctor Wendy Lavezzi would testify she was employed as an assistant medical examiner by the Cook County Medical Examiner's Office on June

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2, 2005, and she conducted a post-mortem examination of the victim on that day. She observed blood emanating from his right ear and a gunshot-wound entrance on the right side of his head. The entrance wound was 3.5 inches beneath the top of the head and 5.1 inches to the right of the anterior midline. There was evidence of loose contact range firing, indicating "the gun was positioned just a few inches or possibly slightly touching" the victim's head when it was fired. The wound's course went from front to back, right to left and downward. In her opinion, the cause of death was a gunshot wound to the head and brain and the manner of death was homicide.

¶ 19 Detective Keith Smith testified that on June 2, 2005, he learned Khalid was a witness to the shooting, and made arrangements for him to be transported to the police station. Detective Smith spoke with Khalid at about 8:30 a.m. Khalid was crying, emotional, and cooperative. After speaking with Khalid, Detective Smith began looking for defendant in the area where he had been known to live. Detective Smith was unable to locate him there. When he returned to the police station at about 12:15 p.m., Detective Smith spoke with Malachi. Malachi was upset, angry, emotional, and crying, but was cooperative in answering questions. In April 2008, Detective Smith learned that defendant was located in North Carolina. On July 3, 2008, Detective Smith and Detective Girardi went to North Carolina, picked up defendant, and brought him back to Chicago.

¶ 20 After Detective Smith's testimony, the State rested.

¶ 21 Reshunda Odom testified for the defense that defendant is the father of her children. They dated on and off for a few years; in June 2005, they were "off." She saw defendant on June 1, 2005. He was over at her house and everything was normal. When Ms. Odom saw defendant, in the early morning hours of June 2, 2005, it was after she had gone out partying and drinking. She came home

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about 4:30 a.m. and went to sleep. Defendant came home and tried to wake her up. She rolled over and paid him no attention. Then he received a phone call and said he was going to leave. Ms. Odom told him "peace out or good riddance" and went back to bed. Ms. Odom testified she could not recall defendant's demeanor because she was under the influence and not in her "right state of mind" at that time. Ms. Odom testified she had not wanted to come to court, and that she was only testifying because she had been subpoenaed.

¶ 22 On cross examination, Ms. Odom testified she knew nothing about the victim's murder.

¶ 23 On redirect examination, Ms. Odom testified she did not want to be involved in the trial and that she was on good terms with the victim's family. Defense counsel asked Ms. Odom, "[b]efore you got the subpoena, you told me that \*\*\* you saw [defendant] and that he appeared to you shocked, upset, and frightened, correct?" The State objected and the trial court sustained the objection. In a sidebar, the trial court denied defense counsel's request to withdraw as counsel in order to testify as to Ms. Odom's prior statements to her.

¶ 24 Defendant testified on his own behalf. Defendant stated he had been friends with Khalid, Malachi, and the victim for years. In June 2005, defendant owed Khalid \$600. Khalid was "kind of angry" because defendant had not yet repaid him the money.

¶ 25 Defendant testified that at about 7:30 p.m. or 8 p.m. on June 1, 2005, Khalid picked him up at his house and they drove around for awhile. Eventually, Khalid received a phone call and then he told defendant he was going to an address on the south side of Chicago, and that he would allow defendant to use the car and his cell phone while he was gone. After Khalid went to the south-side address and left the car, defendant drove to 47th Street and Princeton Avenue looking for his

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children's mother, Reshunda Odom. He found her at about 10 p.m. and asked her to come with him. She got in the car with him, but they began arguing, so he dropped her off at her home and then continued driving around.

¶ 26 Defendant testified that about two hours later, Khalid called him. Defendant picked Khalid up and they went to Cassandra's house. Khalid asked defendant two or three times about when he was going to repay the \$600. Defendant told Khalid to give him some more time. Khalid replied that defendant had had "long enough."

¶ 27 Defendant testified he and Khalid were at Cassandra's house for about an hour when Malachi arrived. The victim arrived after Malachi. They watched television and talked for awhile, and then they all left together. The victim drove them in his car to get something to drink. Then they drove to the victim's house and stayed there for awhile. Eventually, they all returned to the victim's car. The victim was driving, Malachi was in the front passenger's seat, defendant was sitting behind the victim, and Khalid was sitting to defendant's right. Defendant denied telling Malachi, "[y]ou're lucky that's your guy or I'd get him." Defendant also denied telling Khalid he was "hungry."

¶ 28 Defendant testified they drove to Khalid's car on Peoria Street. The victim stopped his car in the middle of the street, put it in park, and then all four of them began exiting. As he was getting out of the car, defendant looked back to his right and saw that Khalid had a gun in his right hand pointed at defendant's face. Defendant grabbed Khalid's hand and the two of them had a "tussle," during which defendant, using both hands, tried to push Khalid away from his face. Defendant demonstrated the movement in court by pushing his hands in front of him with his fingers and hands clasped together.

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¶ 29 Defendant testified:

"Q. [Defense attorney:] And what happened then?

A. [Defendant:] After like maybe one push, the gun went off.

Q. Okay. What—how did you push the gun?

A. Like away from me. Towards—towards like the front passenger's seat.

Q. And the gun went off. \*\*\* Where were your hands when the gun went off?

A. On Khalid's hands.

Q. Where were Khalid's hands?

A. Khalid's hand was on the gun.

\* \* \*

Q. Did you ever fire that gun?

A. No, ma'am.

\* \* \*

Q. Do you know how it is that the gun went off?

A. Khalid's finger was on the trigger."

¶ 30 Defendant testified he and Khalid continued to struggle after the gun went off. Eventually, Khalid released the gun and it flew over the front seat toward the front passenger's side door. Defendant saw the gun go over the front seat, but he did not see where it landed. Khalid exited the rear passenger's side door. Defendant jumped over the front seat and saw that the victim was slumped over toward the front driver's side door. Defendant bumped the victim, and he fell out of the car. Defendant testified he did not know what was going on, and was just delirious and in fear

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for his life. Defendant put the car in drive and then drove away.

¶ 31 Defendant drove to Ms. Odom's house, but she was trying to sleep and did not want to talk to him, so he left. Defendant drove to his mother's house and threw the car keys in the grass. He did not call the police because he did not think they would believe "the truth." At about 4 a.m. or 5 a.m., defendant received a phone call on his cell phone. He looked at the number on the phone to see who was calling him, and he recognized the number as belonging to Khalid. When asked if he recognized Khalid's voice on the phone, defendant stated Khalid "didn't say anything." Defendant further testified:

"Q. [Defense attorney:] So Khalid's number called your phone?

A. [Defendant:] Yes.

Q. But no one said anything on the other end?

A. No.

Q. And what did that tell you? I mean, what did that mean for your state of mind?

A. Maybe he was looking for me—still looking for me.

Q. For what?

A. To kill me."

¶ 32 Defendant testified he then fled to North Carolina, where he was arrested.

¶ 33 On cross examination, defendant testified that when he looked back and saw Khalid holding a gun on him, the gun was about a foot away from him. Defendant put his hands on Khalid's hand, causing the gun to hit the front passenger's seat, and go off. Defendant further testified, in pertinent part:

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"Q. [Assistant State's Attorney:] Your testimony is that as the gun was about a foot away from you, you reach out with both of your hands?

A. [Defendant]: Yes.

Q. And when you reach out, you grab the gun?

A. I grab his hands.

Q. Both of his hands, one on each side, as you demonstrated in court?

A. No. He had one hand out. Maybe his hand went over my hand that was over his hand. You know what I am saying? Like he had the gun. I grabbed his hand with my hands and he grabbed. The other hand was on my hand.

Q. When the gun is pointed at you, you just put both of your hands out. Where did you place both of your hands?

A. On his hand.

Q. On his one hand?

A. Yes.

Q. One on each side of his hands?

A. Yes.

Q. And then he put his other hand on your hand?

A. Yes.

Q. Okay. And that's when you say you are tussling with him. Is that correct?

A. Yes.

Q. And you say the gun goes towards the front seat?

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A. Yes.

\* \* \*

Q. Your hand is on Khalid's hand when you push his hand into the seat?

A. Yes.

Q. And that's when you hear a loud shot?

A. Correct.

Q. The gun is against the seat; correct?

A. The gun is in his hand.

Q. But it is pressed up against the seat; correct?

A. It wasn't pressed. It was a tussle. It was like back and forth. It wasn't like I was holding it to the seat. It was like—you know, it was a struggle.

Q. Right. When did it go off? Was it when it was off the seat or touching the seat?

A. Maybe when it hit—when it touched the seat.

Q. Well, not maybe. When did it go off?

\* \* \*

A. When it hit the seat.

Q. When it hit the seat. So when it went off, it was pressed up against the seat; correct?

\* \* \*

A. No.

Q. It was not?

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A. No.

Q. So in fact it was off the seat; correct?

A. It was still in our hands as we were struggling.

Q. It was still in both of your hands?

A. Yes.

Q. When it went off?

A. Yes.

Q. Not against the seat; correct?

A. To my knowledge, no."

¶ 34 Defendant further testified on cross examination that he left for North Carolina three months after the shooting without ever calling the police. Three years passed between the time when victim was shot and when defendant was found in North Carolina. During those three years in North Carolina, defendant did not call the police about the shooting.

¶ 35 On redirect examination, defendant testified the "tussle" "happened so fast. \*\*\* Everything happened—like it was seconds. Had to have been seconds, yeah." Defendant demonstrated for the jury how he put both of his hands on either side of Khalid's right hand (which was holding the gun) and pushed it away. On recross examination, defendant testified that during the tussle, the gun hit "[t]he back of the seat, headrest piece part."

¶ 36 The State called three rebuttal witnesses. Steven Strzepek, a forensic investigator, testified he processed the victim's recovered vehicle and did not find a gun. Khalid was recalled as a witness and denied pointing a gun at defendant or struggling with defendant over a gun as they were sitting

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in the back seat of the victim's car, and he also denied defendant owed him any money. Malachi also was recalled and testified that he did not see Khalid and defendant struggling over a gun in the back seat of the victim's car.

¶ 37 Following all the testimony, the jury convicted defendant of first degree murder and found that during the commission of the murder, he had personally discharged a firearm that proximately caused the victim's death. The trial court sentenced him to an aggregate of 55 years in prison. Defendant appeals.

¶ 38 First, defendant contends the trial court erred by refusing to instruct the jury on involuntary manslaughter, which is a lesser-included offense of first degree murder. *People v. Robinson*, 232 Ill. 2d 98, 105 (2008). Initially, defendant and the State disagree as to the standard of review. The State contends the giving of jury instructions is reviewed for an abuse of discretion, citing to *People v. Castillo*, 188 Ill. 2d 536 (1999) and *People v. Jones*, 219 Ill. 2d 1 (2006). Defendant argues that whether the evidence warranted an instruction on a lesser offense, is a question of law reviewed *de novo*, citing *People v. Everette*, 141 Ill. 2d 147 (1990). We recently addressed this issue of our standard of review, noting "*Everette* addressed a self-defense instruction, not an instruction on a lesser-included offense, and does not espouse a *de novo* standard of review." *People v. Perry*, 2011 IL App (1st) 081228, ¶ 27. We held the "appropriate standard of review in determining whether a trial court's decision whether to give an instruction on a lesser-included offense is abuse of discretion." *Id.* In accordance with *Perry*, we review the trial court's refusal to instruct the jury on the lesser-included offense of involuntary manslaughter for an abuse of discretion.

¶ 39 "An instruction is justified on a lesser offense where there is some evidence to support the

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giving of the instruction." *Castillo*, 188 Ill. 2d at 540. An instruction defining a lesser offense should be given "if there is any evidence in the record which, if believed by the jury, would reduce a charge of murder to manslaughter." (Internal quotation marks omitted.) *People v. Carter*, 208 Ill. 2d 309, 323 (2003) (quoting *People v. Taylor*, 36 Ill. 2d 483, 488 (1967)). However, "[a]n instruction on a lesser-included offense is not required where the evidence rationally precludes such an instruction. [Citations.]" *People v. Greer*, 336 Ill. App. 3d 965, 976 (2003). "[A] manslaughter instruction should not be given where the evidence shows that the homicide was murder, not manslaughter." *People v. Sipp*, 378 Ill. App. 3d 157, 163 (2007).

¶ 40 A defendant commits first degree murder when he kills an individual without lawful justification and, while performing the acts which caused the death, he: (1) intended to kill or do great bodily harm to the victim or another, or knew such acts would cause death to the victim or another; or (2) he knew that such acts created a strong probability of death or great bodily harm to that victim or another; or (3) he was attempting or committing a forcible felony other than second degree murder. 720 ILCS 5/9-1(a)(1), (a)(2), (a)(3) (West 2004). A defendant commits involuntary manslaughter when he unintentionally kills by performing acts that are likely to cause death or great bodily harm to another and he performs those acts recklessly. 720 ILCS 5/9-3(a) (West 2004). "Murder and the included offense of involuntary manslaughter are thus distinguished only in terms of the mental state required; murder requires the intent to kill or do great bodily harm, or knowledge that the acts committed create a strong probability of such result, while involuntary manslaughter requires only reckless conduct which is likely to cause death or great bodily harm." *Perry*, 2011 IL App (1st) 081228, ¶ 29.

¶ 41 Section 4-6 of the Criminal Code of 1961 provides the following definition of reckless:

"A person is reckless or acts recklessly, when he consciously disregards a substantial and unjustifiable risk that circumstances exist or that a result will follow, described by the statute defining the offense; and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West 2004).

¶ 42 Our supreme court has held, "[f]or purposes of involuntary manslaughter, a person acts recklessly when he consciously disregards a substantial and unjustifiable risk that his acts are likely to cause death or great bodily harm to another." *Castillo*, 188 Ill. 2d at 540-41.

¶ 43 During the jury instruction conference in the present case, defendant requested that the trial court instruct the jury on involuntary manslaughter. Defendant argued that the jury could find from his testimony that the victim's death resulted from defendant's recklessness in pushing Khalid's hand, causing the gun to hit the front seat of the car, and discharge. In refusing defendant's request for an instruction on involuntary manslaughter, the trial court stated:

"I find that in fact the defendant in this case was not speaking about a reckless act but was in fact talking about the fact that it was accidental. He never touched the gun. He touched the hand around the gun. Allegedly that gun was taken out by another third party, not by the victim.

\* \* \*

In this case, the defendant said that he never took out the gun, never touched the gun, that he merely fought with \*\*\* the third party in order to prevent that gun from being pointed

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at him. And that when the gun hit the back of the headrest, it discharged. He never had the gun in his hand. He never, in this court's opinion, consciously disregarded the risks that would be required. And your request for [an involuntary manslaughter instruction] is denied. No mental state that was cognizable was utilized by the defendant."

¶ 44 We agree with the trial court. As recounted above, defendant testified that as he moved to exit the victim's car, he looked to his right and saw that Khalid was suddenly holding a gun in his right hand, and pointing it at defendant's face. Defendant immediately put his hands on each side of Khalid's right hand. Khalid then took his left hand and put it on top of one of defendant's hands. Defendant made "maybe one push" of Khalid's hand away from him. The gun went toward the front passenger's seat, discharged, and struck the victim; defendant gave conflicting testimony as to whether the gun struck the headrest at the time of the discharge. However, defendant consistently testified he never touched the gun or fired the trigger; defendant testified the gun went off because "Khalid's finger was on the trigger." Defendant stated the "tussle" "happened so fast," and was over in "seconds." Thus, if the jury believed defendant's testimony, it would find defendant never touched the gun, but instead put his hands only on Khalid's hand and made one push of Khalid's hand away from his face, and the gun went off in a manner of seconds when Khalid pulled the trigger. Given the brevity of the "tussle," and defendant's wholly defensive maneuver in pushing Khalid's hand away from him without ever touching the weapon itself, there was simply no evidence from which the jury could find that defendant had the requisite mental state for recklessness, *i.e.*, that he consciously disregarded a substantial and unjustifiable risk that his act of pushing Khalid's hand away would likely cause death or great bodily harm to another. Nor was there any evidence from

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which the jury could find defendant's quick defensive maneuver, in which he never even touched the weapon and pushed Khalid's hand only one time away from his face, constituted "a gross deviation from the standard of care which a reasonable person would exercise in the situation." 720 ILCS 5/4-6 (West 2004). Accordingly, as there was no evidence from which the jury could find defendant acted recklessly, the trial court committed no abuse of discretion in refusing to give an instruction on involuntary manslaughter. In further support of our conclusion that there was no abuse of discretion in the failure to give an involuntary manslaughter instruction here, we note that the trial court not only heard all the testimony, but also saw defendant demonstrate the maneuver he used in pushing Khalid's hand away from his face. The trial court, therefore, was in a better position than this court to determine whether said maneuver constituted evidence of recklessness warranting an involuntary manslaughter instruction.

¶ 45 Defendant contends *People v. Robinson*, 163 Ill. App. 3d 754 (1987), compels a different result. In *Robinson*, the defendant there testified that as he was talking to the victim, he saw one of the victim's companions pull a shotgun from the trench coat he was wearing. *Id.* at 759. Defendant "grabbed for the gun, and it fell to the ground in the struggle and discharged, striking the victim." *Id.* Defendant never touched the trigger, although he did handle the butt and barrel of the gun. *Id.* We held, in pertinent part, that the trial court erred by refusing to give defendant's tendered involuntary manslaughter instruction to the jury where it could have found from his testimony that he acted recklessly in grabbing for the victim's gun and struggling for its control. *Id.* at 779-80. Unlike *Robinson*, defendant's testimony here was that he never grabbed Khalid's gun, nor did he touch any portion of the weapon or attempt to gain its control; rather, defendant merely pushed

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Khalid's hand away from his face in a quick, defensive maneuver. As discussed, defendant's quick, defensive maneuver was not evidence from which the jury could find he had the requisite mental state for recklessness. Accordingly, *Robinson* is factually inapposite.

¶ 46 *Castillo*, a supreme court case decided subsequent to *Robinson*, is more analogous. In *Castillo*, the defendant there testified he went into a bar at approximately 1:30 a.m. *Castillo*, 188 Ill. 2d at 539. A man smelling of alcohol (the victim) came up to him and said he wanted to fight. *Id.* Defendant told the victim he had mistaken him for someone else; the victim hit defendant, who then left the bar. *Id.* The victim caught up with defendant in the parking lot, pushed him on the shoulder, and stood in front of him. *Id.* They began to struggle, and the victim "produced" a gun and pointed it at defendant. *Id.* Defendant grabbed the victim's hand, and the victim fired one shot. *Id.* Defendant then took the gun away from the victim. *Id.* The victim pulled defendant's shirt sleeve, causing the gun to fire another shot, which struck the victim. *Id.* A jury convicted defendant of murder. *Id.* at 540. On appeal, defendant contended the trial court erred by refusing to instruct the jury on involuntary manslaughter. *Id.* Defendant argued that his own testimony provided some evidence that he acted recklessly in struggling with the victim over the gun. *Id.* at 541. The supreme court disagreed, holding:

"In order for this act to be reckless, defendant must have consciously disregarded a substantial and *unjustifiable* risk that the act would cause death or great bodily harm. [Citations.] The only evidence in defendant's testimony that he suggests is evidence of recklessness is that he struggled with the victim after the victim drew a gun and threatened to injure him. This testimony, however, was not evidence of recklessness, but was instead

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some evidence that defendant acted with regard to a *justifiable* risk of injuring the victim in order to protect himself. The evidence contained in defendant's own testimony thus did not warrant an involuntary manslaughter instruction." [Emphasis in original.] *Id.*

¶ 47 Similarly, in the present case, defendant testified he pushed Khalid's hand away only *after* Khalid drew a gun and aimed it at defendant's face. Khalid's act of drawing a gun and aiming it at defendant's face justified defendant's quick, defensive maneuver of pushing Khalid's hand away from him. As in *Castillo*, defendant's testimony did not suggest evidence of recklessness and thus did not warrant an involuntary manslaughter instruction.

¶ 48 Further, any error in the failure to give an involuntary manslaughter instruction was harmless. The jury was presented with two versions of the shooting. According to the State's witnesses, Khalid and Malachi, defendant produced the weapon inside of the victim's car, and intentionally shot the victim in the head. According to defendant, Khalid produced the gun inside of the victim's car and aimed it at defendant, and the gun accidentally discharged and struck the victim as defendant pushed Khalid's hand away from his face. The jury obviously believed the State's witnesses and disbelieved defendant, as it convicted defendant of first degree murder, and rejected the defense theory that the weapon fired accidentally in the course of defendant pushing Khalid's hand away from his face. Even if the jury had been given an involuntary manslaughter instruction, the jury could only have convicted defendant of involuntary manslaughter if it found that the shooting occurred as testified to by defendant, *i.e.*, that Khalid pulled the gun and aimed it defendant, who pushed Khalid's hand away, causing the gun to discharge and strike the victim. Having rejected defendant's version of the shooting, the jury would not have convicted him of involuntary manslaughter, even if such an

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instruction had been given.

¶ 49 Next, defendant contends his trial counsel provided ineffective assistance by failing to request a self-defense instruction. A person is justified in the use of force in self-defense against another that is intended or likely to cause death or great bodily harm when he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself or another, or the commission of a forcible felony. 720 ILCS 5/7-1(a) (West 2004).

¶ 50 Defense counsel specifically explained to the trial court that her rationale for not requesting a self-defense instruction was because defendant testified he was trying to push Khalid's hands away when the gun accidentally fired and, thus, the shooting was accidental and not the result of self-defense. Defendant contends his trial counsel had an incorrect understanding of the law and, "[w]here there is evidence of self-defense in addition to evidence of accident, the defendant has the right to rely 'on an accident theory as to the ultimate injury *and* a self-defense theory as to his preceding acts.' " (Emphasis in original.) *People v. Bedoya*, 288 Ill. App. 3d 226, 237 (1997) (quoting *Robinson*, 163 Ill. App. 3d at 768). Defendant argues he is entitled to an instruction on self-defense even when he testifies the ultimate harm is accidental, if " 'the preceding events could place [his actions] in the context of self-defense.' " *People v. Whitelow*, 162 Ill. App. 3d 626, 629 (1987) (quoting *People v. Buchanan*, 91 Ill. App. 3d 13, 15 (1980)). Defendant contends this case is like *Robinson*, discussed above, where we held that the trial court should have given a self-defense instruction where the gun went off in a struggle, even though the defendant in *Robinson*, like defendant here, did not touch the trigger. *Id.* at 771. Defendant contends his trial counsel's failure to request the self-defense instruction constituted ineffective assistance.

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¶ 51 To determine whether defendant was denied his right to effective assistance of counsel, we apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). First, defendant must show "counsel's representation fell below an objective standard of reasonableness" (*Strickland*, 466 U.S. at 688), and second, he was prejudiced such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694.

¶ 52 To prevail on his claim of ineffective assistance, defendant must satisfy both prongs of the *Strickland* test. If we can dispose of defendant's ineffective-assistance claim because he suffered no prejudice, we need not address whether his counsel's performance was objectively reasonable. *People v. Lacy*, 407 Ill. App. 3d 442, 457 (2011).

¶ 53 There was no ineffective assistance here. The State's theory at trial, as testified to by Khalid and Malachi, was that defendant held the gun in the car and intentionally shot the victim. The defense theory at trial, as testified to by defendant, was that Khalid held the gun in the car and aimed it at defendant. When defendant pushed his hand away, the gun accidentally fired, striking the victim. The jury obviously believed Khalid's and Malachi's version of events instead of defendant's, because it convicted defendant of first degree murder. Defendant's theory of self-defense, which he now claims the jury should have been instructed on, is virtually identical to the theory he presented at trial, *i.e.*, that Khalid held the gun in the car and aimed it at defendant's face. When defendant struggled with Khalid and pushed his hand away, the gun accidentally went off, striking the victim. No reasonable probability exists that the giving of the self-defense instruction would have caused the jury to make any different credibility determinations than the ones it actually made, in which, it

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found Khalid's and Malachi's version of events more credible than defendant's version. Defendant still would have been convicted of first degree murder. In the absence of any prejudice by the failure to tender a self-defense instruction, defendant's claim of ineffective assistance fails.

¶ 54 Defendant makes a two-sentence argument in his appellant's brief that his trial counsel provided ineffective assistance by failing to request second degree murder instructions. Unlike his detailed argument regarding defense counsel's alleged ineffectiveness for failing to tender a jury instruction on self-defense, defendant's argument for reversal, based on the failure to request second degree murder instructions, is so cursory that it fails to meet the standard of Illinois Supreme Court Rule 341(h)(7), which requires the appellant to put forth reasons for his argument. Defendant, again, cursorily references the issue in his reply brief. However, Rule 341(h)(7) provides, "[p]oints not argued are waived and shall not be raised in the reply brief." Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). The issue is waived.

¶ 55 Next, defendant contends the State made improper remarks during closing arguments depriving him of a fair trial. Prosecutors have great latitude in making their closing arguments, and such arguments are proper if they are based on the record, or are reasonable inferences drawn therefrom. *People v. Moya*, 175 Ill. App. 3d 22, 24 (1988). The entire record, particularly the full argument of both sides, must be considered to assess the propriety of prosecutorial argument. *People v. Williams*, 313 Ill. App. 3d 849, 863 (2000). "Where the complained-of remarks are within a prosecutor's rebuttal argument, they will not be held improper if they appear to have been provoked or invited by defense counsel's argument." *Id.* Prosecutorial comments constitute reversible error only if they engender "substantial prejudice." *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007).

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Substantial prejudice occurs when "the improper remarks constituted a material factor in a defendant's conviction." *Id.*

¶ 56 In *Wheeler*, our supreme court applied a *de novo* standard of review to the issue of prosecutorial statements during closing arguments. *Id.* at 121. In *People v. Blue*, 189 Ill. 2d 99 (2000), which was cited by *Wheeler*, our supreme court applied an abuse of discretion standard. *Id.* at 128. We need not resolve the issue of the appropriate standard of review, because our holding affirming the trial court would be the same under either standard.

¶ 57 First, defendant challenges the following remark made by the prosecutor during rebuttal argument:

"[Defendant] got up there on the stand with an unbelievable story, a story that he was able to script out and rehearse from the time he murdered [the victim] until the time he was arrested in 2008, and that he had the opportunity to practice that until he testified. But that's what it is. It's a scripted piece of fiction and nothing else. "

¶ 58 Defendant contends the prosecutor's remark improperly disparaged him and his theory of defense by implying he was a liar, and that his defense was fabricated.

¶ 59 The complained-of comment must be considered in the context in which it was made. Prior to the prosecutor's rebuttal argument, defense counsel urged the jury to disregard Khalid's account as not making sense. Defense counsel called Khalid and Malachi "brothers in deceit," contending they had lied about defendant's involvement in order to cover up that Khalid was the killer. Defense counsel argued that in the first several hours after the shooting, Khalid and Malachi "had plenty of time to get together to talk about what happened and to try and come up with some theory about what

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happened."

¶ 60 The prosecutor's remark during rebuttal argument, that defendant had rehearsed his "scripted piece of fiction," was made in response to defense counsel's argument that Khalid and Malachi had lied about the shooting, and that they had the time to get together and "try and come up with some theory about what happened" in order to pin the shooting on defendant. Defense counsel's remarks invited the prosecutor's line of argument that defendant, and not Khalid and Malachi, was lying about the identity of the shooter. "[W]hen defense counsel provokes a response, the defendant cannot complain that the prosecutor's reply denied him a fair trial." *People v. Hudson*, 157 Ill. 2d 401, 445 (1993).

¶ 61 Defendant next contends he was denied a fair trial when the prosecutor made the following remarks during rebuttal argument:

"[Defendant's version of the shooting] was never mentioned in opening statements by the defense. And when they questioned the witnesses Khalid and Malachi the first time, they never asked any question about that.

DEFENSE ATTORNEY: Objection.

THE COURT: Basis?

DEFENSE ATTORNEY: Judge, it impugns the defense.

THE COURT: Overruled.

ASSISTANT STATE'S ATTORNEY: They didn't ask him the questions, and they didn't let you see their reaction. It didn't let you see how they would answer those questions. And in fact, we had to call them back to ask him those questions.

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DEFENSE ATTORNEY: Objection, that is improper.

THE COURT: Overruled.

ASSISTANT STATE'S ATTORNEY: They argue credibility. Well, how credible was this defendant? How credible was his story? It wasn't."

¶ 62 Defendant contends the substance of the prosecutor's remarks was an impermissible attack upon defense counsel's integrity because the prosecutor accused defense counsel of knowing that defendant's testimony was fabricated and, in turn, employing trial tactics to facilitate this fabrication.

¶ 63 We disagree. *Hudson* is informative. In *Hudson*, the defendant there argued that the State suggested defense counsel fabricated the insanity defense, as evidenced by the following comments during closing arguments:

"You know, this whole defense of insanity on these facts would be laughable if we weren't dealing with such a serious case, such an important case. This whole theory the defense has concocted to present to you here in court would be laughable. But it's not laughable. *Id.* at 442.

¶ 64 Our supreme court held, "[w]hile the term 'concoct' may connote a strategy fabricated for trial, it does not necessarily imply that the defense counsel played any role in its creation. Such comments relied on by defendant do not sufficiently refer to defense counsel or attribute any particular wrongdoing to him. In addition, the prosecutor did not challenge the motives or ethics of defense counsel." *Id.* at 443. The supreme court held that the prosecutor's comments were directed to the credibility of the defendant, *not* defense counsel, and that there was no error where sufficient evidence supported the prosecutor's comments that defendant concocted his insanity defense. *Id.* at

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443-44.

¶ 65 Similarly, in the present case, the complained-of remarks attacked the credibility of *defendant's* testimony regarding the shooting and did not constitute an attack on defense counsel's integrity. The prosecutor's remarks were made in response to defense counsel's closing argument attacking the credibility of the State's witnesses (see our discussion above), and did not constitute reversible error.

¶ 66 Next, defendant contends the prosecutor disparaged defense counsel by making the following remarks during rebuttal argument:

"And this is not the case, the People of the State of Illinois versus Khalid Crockerhan, and it's not the case of the People of the State of Illinois versus Malachi Crockerhan. This is a purposeful attempt to dirty them up.

\* \* \*

This is a purposeful attempt to dirty up Khalid and Malachi to make them look like they're the bad guys here when they went to the police and they reported that their friend had been murdered by [defendant]. This is the People of the State of Illinois versus [defendant]. He's on trial here."

¶ 67 The prosecutor's remarks were invited by defense counsel's argument (discussed above) that accused Khalid and Malachi of having the time to fabricate their version accusing defendant of committing the shooting. As the prosecutor's remarks were made in response to defense counsel's argument, they did not constitute error. *Id.* at 445.

¶ 68 Next, defendant contends the prosecutor continued to disparage defense counsel by

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referencing that Ms. Odom was a reluctant witness for the defense, and that when she gave unfavorable testimony, defense counsel elicited her connections to the victim's family. The prosecutor's remarks were an accurate recitation of Ms. Odom's testimony and did not constitute reversible error.

¶ 69 Next, defendant contends the prosecutor misstated the evidence when she remarked:

"And Khalid and Malachi came in here, and they told you about themselves. They told you about their convictions. They told you about what happened that day. And they told you about what and who they spoke to. They even told you that the police did take their cell phone or at least Khalid's and that they gave it back to him. Maybe that's because it corroborated what he said."

¶ 70 Defendant argues that contrary to the prosecutor's argument, there was no evidence presented at trial that the police took Khalid's cell phone, or that there was anything on the cell phone corroborating his version of the shooting. Contrary to defendant's argument, Khalid testified he gave the police his cell phone, which they later returned to him. We do agree with defendant, though, that the prosecutor misstated the evidence by arguing that "maybe" there was something on the cell phone corroborating Khalid's version of the shooting. No such evidence was presented at trial. However, given the fleeting nature of the reference, which was not elaborated upon by the State, we cannot say it engendered substantial prejudice constituting reversible error.

¶ 71 Defendant argues the cumulative effect of the "numerous instances of prosecutorial misconduct during the State's rebuttal arguments are of such a degree that they constitute reversible error because there is a reasonable basis for believing that the jurors were prejudiced by these

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remarks." We disagree. As discussed above, the only error made by the prosecutor was her fleeting reference to the police taking Khalid's cell phone and returning it to him because "maybe \*\*\* it corroborated what he said." This isolated comment did not constitute reversible error. Defendant's argument based on cumulative error is without merit.

¶ 72 In his reply brief, defendant contends the prosecutor denied him a fair trial by remarking during closing arguments that he "needed years to come up with his story." Defendant waived review by failing to make this argument in his appellant's brief. Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 73 For the foregoing reasons, we affirm the trial court.

¶ 74 Affirmed.