FOURTH DIVISION
Rule 23 Order filed on June 23, 2016
Modified upon denial of rehearing August 4, 2016

1-13-0138



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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. 11 CR 3136 |
| | ) | |
| KENNETH HATCHER, | ) | Honorable |
| | ) | Mary Margaret Brosnahan, |
| Defendant-Appellant. | ) | Judge Presiding. |

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JUSTICE HOWSE delivered the judgment of the court.
Justices Ellis and Cobbs concurred in the judgment.

**ORDER**

¶ 1 *Held*: Defendant's convictions for first degree murder and aggravated battery with a firearm are affirmed; none of the prosecutor's comments during closing or rebuttal argument prejudiced defendant or deprived defendant of his right to a fair trial, and the trial court's limited *in camera voir dire* did not violate the sixth amendment.

¶ 2 Defendant, Kenneth Hatcher, was convicted of multiple offenses including the first degree murder of Jeremy Harris and three counts of aggravated battery with a firearm for shooting Michael Martin, Jamica Martin, and Sharonik Haynes. Following trial, a jury found

defendant guilty. Defendant filed a posttrial motion arguing the prosecutor made improper remarks during argument. The trial court denied defendant's posttrial motion and sentenced defendant to 50 years' imprisonment for the first degree murder conviction and 12 years' imprisonment for each aggravated battery with a firearm conviction with all sentences to run consecutively. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 Defendant's primary contention on appeal is that improper statements by the prosecutor during rebuttal closing arguments denied him his right to a fair trial. Prior to trial, the trial court conducted a portion of the jury *voir dire in camera*, a fact that forms the basis of defendant's second argument for reversing his conviction. We briefly summarize the evidence presented at trial.

¶ 5 This case arose from an encounter between defendant and Jacqueline Johnson, which took place in a convenience store located near the intersection of 100th Street and Michigan Avenue in Chicago on October 26, 2010. At the time of the encounter defendant was accompanied by his uncle Michael Hatcher, and Michael Hatcher's girlfriend, Sereeta Bradley. Defendant had recently moved in with his uncle from South Bend, Indiana, where defendant had lived for the previous ten years. Jacqueline Johnson testified she was shopping in the store and was offended by something the defendant said to her. Johnson walked home and told her children Michael Martin and Jamica Martin what had occurred. Michael and Jamica then walked toward the store to confront defendant.

¶ 6 When Michael and Jamica Martin arrived at the corner, defendant, Michael Hatcher, and Bradley were outside at a bus stop. Michael and Jamica confronted them about the incident with Johnson. According to defendant and Bradley, a third man with dreadlocks was with the Martins. Bradley testified Jamica was holding a large stick like a closet pole. Michael Martin

began arguing with Michael Hatcher. Defendant and Bradley testified Michael Martin threatened them. Defendant, Michael Hatcher, and Bradley walked away down an alley. Defendant testified that as they were walking down the alley they could hear the Martins walking down the street continuing to make threats. Defendant testified his uncle became angry at this and produced a handgun while still in the alley. Defendant testified he did not know Michael Hatcher had the gun. Defendant testified he and Bradley took the gun from Michael Hatcher and tried to calm him down.

¶ 7 Defendant, Michal Hatcher, and Bradley exited the alley and continued walking. They encountered a group of people including Johnson, Michael Martin, Jamica Martin, Sharonik Haynes, and Jeremy Harris, among others. Jamica was holding a broken broomstick handle. Michael Martin began arguing with Michael Hatcher. They were the only two arguing. Johnson stepped between Martin and Hatcher. Johnson pointed at defendant and said that defendant was the one who called her a derogatory word. Defendant testified that while this was happening he observed the dreadlocked man who was with Michael and Jamica Martin during the confrontation at the convenience store standing behind Michael Martin. The man kept reaching toward his hip. Defendant testified that after Johnson stepped between them, Jamica began moving toward him with a broomstick over her head like a bat. Michael Martin had made fists and appeared to be ready to fight, and the dreadlocked man reached for his hip as if to produce a gun. Defendant testified he heard a shot fired, and then he pulled out his gun and began firing.

¶ 8 Johnson testified that Jamica picked up part of a broomstick and Johnson told her to put it down. Johnson took the stick and threw it away. Defendant produced a black revolver and fired it six times toward the crowd of people.

¶ 9 Jamica Martin testified she put the stick down after her mother told her to, and then defendant pulled out a black gun and started firing in the direction of the crowd.

¶ 10 Michael Martin testified that after approximately five minutes of arguing, defendant pulled out a gun, shot him (Michael Martin), then turned the gun towards the rest of his family.

¶ 11 Haynes testified that Johnson stepped between the two men stating it was over, and defendant maneuvered around the crowd, pulled out a gun, and started shooting.

¶ 12 Bradley testified that when she heard the first gunshot defendant was standing immediately to her left but the shot did not appear to come from right next to her. The first shot appeared to come from a distance. She testified on cross-examination that she was standing next to defendant, so she would have known if he shot because "it would have been in my ear." She reiterated that she heard the first shot from a distance. Reginald Ellis was a witness to the shooting called to testify by the defense. Ellis testified that he heard "one shot" before the shooter pulled anything from his pocket. Later in his testimony Ellis was asked again: "you heard a gunshot before you saw the person pull the gun out of the pocket, right?" and he answered: "No, I did not." On cross-examination by the State, Ellis testified that when he heard the first shot, defendant's hands were down low near his pocket. After the first shot, defendant lifted his hands and that is when Ellis actually saw defendant shooting, after the second or third shot.

¶ 13 Michael Martin, Jamica Martin, and Sharonik Haynes received gunshot wounds to the thigh, right knee, and back, respectively. Jeremy Harris was shot in the back of the head. He was transported to the hospital and later died.

¶ 14 Defendant testified he, Michael Hatcher, and Bradley returned to Michael Hatcher's apartment, then they went to his grandmother's home. Defendant later returned to South Bend, Indiana where, almost three months after the shooting, South Bend police arrested defendant on a warrant. When Chicago police came to Indiana to interview defendant, he initially told them he

had not been in Chicago for ten years. At trial, defendant admitted to firing his gun but said he did so in self-defense after someone else fired first.

¶ 15 The jury found defendant guilty of one count of first degree murder and three counts of aggravated battery with a firearm.

¶ 16 This appeal followed.

¶ 17 ANALYSIS

¶ 18 Defendant argues he is entitled to a new trial because of any one of several categories of improper comments by the prosecutor during rebuttal closing argument and separately because of the cumulative impact of those and other improper comments. Defendant claims the prosecutor (1) misstated the evidence, (2) shifted the burden of proof to defendant and testified on the issue, and (3) argued defense counsel fabricated the defense and called defendant a liar without grounds. Defendant also argues the prosecutor improperly vouched for the credibility of the state's witnesses, expressed personal opinions about the case, and made irrelevant comments meant solely to inflame the jury.

¶ 19 Defendant objected to the State's closing arguments in a posttrial motion, however, defendant did not make a contemporaneous objection to each comment complained of in this appeal, and thus failed to preserve all of the allegedly improper comments for review. *People v. Belknap*, 2014 IL 117094, ¶ 66 ("To preserve an alleged error for review, a defendant must both make an objection at trial and include the issue in a posttrial motion."). Defendant asks this court to review his claims under either prong of the plain error rule.

> "[T]he plain-error rule *** allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred

> and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. [Citation.] Essentially, the fairness of the trial must be undermined. [Citation.] The defendant bears the burden of persuasion under each prong of the doctrine. [Citation.] If the defendant is unable to establish plain error, the procedural default must be honored." (Internal quotation marks omitted.) *People v. Johnson*, 238 Ill. 2d 478, 494-95 (2010).

¶ 20 "The first step of plain-error review is determining whether any error occurred. [Citation.]" *People v. Johnson*, 2015 IL App (1st) 141216, ¶ 18. If there is no error there can be no plain error. *People v. Sumler*, 2015 IL App (1st) 123381, ¶ 68. "[T]o determine whether a purported error is 'plain' requires a substantive look at it." (Internal quotation marks omitted.) *People v. Johnson*, 208 Ill. 2d 53, 64 (2003). Further, "we must consider the arguments of the parties in their entirety to consider them in context and determine if the preserved comments were unduly prejudicial." *People v. Tijerina*, 381 Ill. App. 3d 1024, 1033 (2008). Accordingly, we turn to defendant's contentions on appeal to determine whether the prosecutor's comments rose to the level of "error." The general principles applicable to that determination are well-settled.

> "Prosecutors are afforded wide latitude in closing argument. [Citation.] In reviewing comments made at closing arguments, this court asks whether or not the comments engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them. [Citation.] Misconduct in closing argument is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant's conviction. [Citation.] If the jury could have reached a contrary verdict had the

> improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted. [Citation.]" *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). See also *People v. Jackson*, 2012 IL App (1st) 102035, ¶ 18.

¶ 21 Generally the standard of review we employ to determine whether the court committed error by allowing improper argument is the abuse of discretion standard. *People v. Johnson*, 385 Ill. App. 3d 585, 603 (2008) (citing *People v. Tolliver*, 347 Ill. App. 3d 203, 224 (2004); *People v. Abadia*, 328 Ill. App. 3d 669, 678 (2001)). But in 2007 "our supreme court held: 'Whether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo*.' [Citation.]" *Id.* (quoting *Wheeler*, 226 Ill. 2d at 121). Accordingly, there is some tension in this situation as to whether we should review the alleged improper argument under the abuse of discretion standard or whether we should determine *de novo* whether the comments are improper as a matter of law. *Id.* ("Since *Wheeler*, appellate courts have been divided regarding the appropriate standard of review."). In this case we note defendant failed to make a timely contemporaneous objection to the majority of the alleged comments and the objections were not made until he filed his motion for new trial, therefore no discretion was exercised by the court until it considered the motion for new trial. When a contemporaneous objection has been made to allegedly improper comments any harm can usually be corrected with an instruction from the court. *People v. Campbell*, 2012 IL App (1st) 101249, ¶ 42. However we believe it is not necessary to resolve this issue here because our holding in this case will be the same under either standard. *Johnson*, 385 Ill. App. 3d at 603 ("we do not need to resolve the issue of the appropriate standard of review at this time, because our holding in this case would be the same under either standard").

¶ 22 With the foregoing principles in mind we turn to a consideration of the prosecutor's allegedly improper comments.

¶ 23 A. Misstating the Evidence

¶ 24 As previously stated, defendant admitted to firing the handgun but claimed he did so in self-defense. Thus, defendant argues, a determinative issue at trial was whether someone else fired a gun before defendant pulled out his gun and started shooting. Defendant argues the prosecutor misstated the evidence during rebuttal argument when he stated that there was no testimony and no physical evidence about an additional gunshot other than defendant's own testimony. Defendant argues this was a misstatement of the evidence because Bradley and a second witness, Reginald Ellis, both provided testimony that gave some support to defendant's contention that there was a gunshot before he pulled out his gun. Defendant failed to object to the allegedly improper comments at trial.

¶ 25 The statements about which defendant complains for this argument were as follows:

> "MR. VALENTINI [Assistant State's Attorney]: And the fact of what happened are they can't change no matter what they say. Based on the evidence you heard from credible witnesses in this courtroom is that this defendant shot four people that day. They were all teenagers, two were girls.
>
> He shot one girl in the back, and he shot Jeremy Harris in the back of the head and that's not based on magic bullets. It's not based on speculation. It's based on cold hard evidence that came forward during the course of this short trial.
>
> There's nothing about any of that or anything this guy did after the shooting that is consistent with self-defense, nothing, nothing, nothing, nothing. He did nothing that day consistent with what somebody would do if they had shot

> in self-defense, nothing. A person who shoots in self-defense is a victim and an innocent person. Innocent people and victims don't run away. They don't flee. They don't hide. They don't call their father to put them on the next train out of town and then hide from the police and lie to the police when the police come and talk to them about the crime.
>
> This defendant did all of those things. Today the defendant's lawyer is telling you that there's a second shooter on that block that day. That's what he's telling you. You know what that's based on, based on the defendant's testimony yesterday. Yesterday the defendant said there was another guy out there with a gun, and he shot first.
>
> * * *
>
> [H]e lied about this phantom shooter because there's not a shred of evidence in 23 months of anybody ever saying that. The physical evidence doesn't support it and no one else said it. It's not corroborated. It's made up. His aunt didn't even say it."

¶ 26 The State responds the prosecutor's comments were "entirely accurate summaries of the facts that were elicited at trial." The State says the prosecutor's argument was that nothing about defendant's conduct was consistent with self-defense. The State argues the rebuttal was "simply an exhortation to the jury that defendant's theory was wholly inconsistent with the undisputed evidence of defendant's conduct" during and after the shooting.

¶ 27 "A prosecutor has great latitude in closing argument and may argue fair and reasonable inferences drawn from the evidence at trial. [Citation.] However, he may not argue facts not based on evidence in the record. [Citation.] A prosecutorial misstatement does not necessarily deprive a defendant of a fair trial. [Citation.]" (Internal quotation marks omitted.) *Jackson*,

2012 IL App (1st) 102035, ¶ 18. Where the evidence is closely balanced a misstatement that speaks directly to the dispositive issue at trial substantially prejudices the defendant. *Id.* ¶ 20. An admonishment to the jury that closing arguments are not considered evidence is insufficient to cure such an error. *Id.*

¶ 28 We agree with the State that the prosecutor properly argued that defendant's conduct was not consistent with a theory of self-defense when the prosecutor argued that nothing "this guy did after the shooting [was] consistent with self-defense ***." "[I]t is not error for the State to challenge a defendant's credibility or the credibility of his theory of defense when evidence exists to support the challenge." *People v. Glasper*, 234 Ill. 2d 173, 207 (2009). The prosecutor pointed out to the jury the evidence that supported his challenge to defendant's self-defense theory. Specifically, evidence that defendant never called police after the incident, fled Chicago, and lied to police when initially confronted. The prosecutor's statement there was "nothing about any of *that*" (emphasis added) consistent with self-defense referred to the prosecutor's recitation of specific evidence adduced at trial given just before that statement, and not to the evidence as a whole. The prosecutor pointed out that four people were shot and two were shot in the back. The prosecutor could argue that defendant was not acting in self-defense when at least two of the victims were fleeing or turned away from defendant and, although defendant claimed there was only one additional shooter, a total of four people were shot.

¶ 29 The prosecutor could also argue to the jury that Bradley did not say there was a second shooter and that the physical evidence does not support defendant's claim there was a second shooter. "The trier of fact must resolve conflicts in the testimony. [Citation.]" (Internal quotation marks omitted.) *People v. Willis*, 2013 IL App (1st) 110233, ¶ 77. The prosecutor may argue facts based on evidence in the record. See *Jackson*, 2012 IL App (1st) 102035, ¶ 18. The evidence supported the prosecutor's arguments.

¶ 30 First, Bradley testified she never saw defendant with a gun or shoot a gun on the day of the shooting. The State impeached Bradley with her statement to police that she saw the shooting and who had done the shooting. The detective who interviewed Bradley the day after the shooting testified that Bradley did not tell him she did not see who had done the shooting and she identified defendant as the shooter. Bradley admitted she did not tell police about a shooting from a distance.

¶ 31 Second, a ballistics expert testified that two kinds of .22 caliber bullets were recovered from the shooting (one from the body of the deceased and one from the body of Michael Martin), it was possible to fire two different kinds of ammunition from a revolver (which was the type of gun used in this case), and she could not say whether or not the two bullets had been fired from the same gun. Defendant argues the prosecutor could have argued why the jury should not give weight to the ballistics expert's testimony that she could not determine that the two bullets came from the same gun but it was impermissible for the prosecutor to argue the evidence did not provide any corroboration of defendant's testimony.

¶ 32 The prosecutor may not overstate the evidence. *People v. Linscott*, 142 Ill. 2d 22, 30-31 (1991). In *Linscott*, the prosecutor improperly argued that hairs removed from the victim's apartment "were conclusively identified as coming from [the] defendant's head and pubic region." *Id.* at 30. The evidence at trial was that "no such identification" is possible from hair. *Id.* at 29-30. In this case, the prosecutor did not similarly overstate the evidence. The prosecutor did not argue that the evidence showed that the bullets were fired from the same gun. "The prosecution is afforded wide latitude in making closing arguments so long as the comments made are based on the evidence or reasonable inferences drawn therefrom." *People v. Gonzalez*, 388 Ill. App. 3d 566, 587 (2008). The jury could reasonably infer from the evidence that the two bullets were fired from the same gun, thus the prosecutor in this case could argue that the

physical evidence did not corroborate defendant's testimony there was a second shooter. See *Id.* at 590 (although witness testified that the defendant had one particle of gunshot residue on his hand and *may* have fired a gun, prosecutor could argue that "based upon that and the other evidence presented at trial, it was reasonable to infer that [the] defendant had gunshot residue particles on his hand because he fired a weapon and killed the victim").

¶ 33 The prosecutor's arguments cannot be construed as an assertion that there was absolutely no evidence to support defendant's self-defense theory other than defendant's own testimony. Rather, the prosecutor merely argued the evidence that was inconsistent with that theory, which he was allowed to do. *Glasper*, 234 Ill. 2d at 207. We also find that the prosecutor did not improperly suggested to the jury that defense counsel's opening statement was evidence that the jury could consider. Defendant complains of the following comments by the prosecutor in rebuttal:

> "MR. VALENTINI [Assistant State's Attorney]: Never a word by anybody not word one about a second shooter because there was no second shooter. It's made up. It's a bogus defense not to be believed. You didn't even hear it in opening statements. They gave an opening statement in this case, and the fact of the second phantom shooter is so important they kept it from everybody safe in a lock box until the defendant testified."

¶ 34 Defendant did not object to this statement at trial. The State argues that when viewed in context the prosecutor was only arguing that defendant's testimony about a second shooter should be rejected as wholly incredible. We agree. "A prosecutor may suggest a defendant is a liar if supported by the evidence or a reasonable inference from the evidence. [Citation.]" *Tijerina*, 381 Ill. App. 3d at 1037. In *Tijerina* the prosecutor argued: "[F]rom the first minute of their opening statement on Tuesday, throughout the trial, and right up until two minutes ago you

have all been under siege, besieged with one diversionary tactic after another, trying to cast blame and point fingers at anybody and everything, anything and everything aside from him." *Id.* at 1033. This court found that although the prosecutor's "rhetorical flourishes were unnecessary, the fact remains that he also supported these arguments specifically citing to the evidence, in particular the fact that [the] defendant's story at trial was vastly different from his prior version of the incident." *Id.* at 1037. In this case, the prosecutor (the same prosecutor in *Tijerina*) also supported his argument that defendant fabricated the second shooter by citing to the evidence. Particularly, the prosecutor cited evidence that no witness mentioned a second shooter at any time prior to trial, including Bradley. We do not find that the statement was improper.

¶ 35 Defendant also argues the prosecutor improperly urged the jury to rely on facts not in evidence when he argued that the defense did not call Michael Hatcher as a witness because Michael Hatcher's testimony would have been inconsistent with defendant's testimony. The prosecutor argued as follows:

> "MR. VALENTINI [Assistant State's Attorney]: The defense doesn't have to put a case on at all. What Mr. Burch said before is absolutely correct. The burden is on us. We love that burden. It's what makes the system great. But if they choose to put a case on you have to look at it in the light the same way you look at the State's witnesses, and if Michael Hatcher was there, you would have seen the same thing this kid testified to.
>
> They were standing right next to each other. Where is Michael Hatcher? His wife—girlfriend for 14 years testified—where is he? You know why he's not in court? You watched the defendant testify and you watched his aunt [(Bradley)] testify. They didn't exactly say the same thing, did they?

* * *

At some point, it became obvious that one mistake was enough, and there was no need to bring in Michael Hatcher to screw it up even more."

¶ 36 Defendant argues this statement was an improper argument based on facts not in evidence because the prosecutor suggested to the jury what Michael Hatcher's testimony would have been. Defendant's trial attorney did not object when the statement was made. The State argues that in *People v. Burrows*, 148 Ill. 2d 196, 253-54 (1992), our supreme court held that in certain circumstances, it is permissible for a prosecutor to point out that a defendant did not call a known witness who would corroborate his testimony and bolster his theory of defense. In *Burrows*, the prosecutor made a statement during rebuttal argument referring to the absence of a witness. The defense objected and the prosecutor cited *People v. Kubat*, 94 Ill. 2d 437, 498 (1983), to the trial court as authority stating that he could comment because the defense brought up the witness. In *Kubat*, the court held that "where a defendant injects into the case the name of an alibi witness and then fails to call the witness, the prosecutor may legitimately comment on the lack of such evidence ***. [Citation.]" *Id.* at 253 (quoting *Kubat*, 94 Ill. 2d at 498).

¶ 37 The *Burrows* court, relying on *Kubat*, found that a defense witness had injected the name of the missing witness into the case therefore the prosecutor could comment on that witness's absence. A jury "may properly consider any facts developed in the trial from which a reasonable inference may be drawn for or against either party." *People v. Williams*, 40 Ill. 2d 522, 528 (1968). "For instance, if it is developed in a trial that a witness exists, presumably under the control of a defendant, who can throw light upon a vital matter, and he is not produced, certainly a jury may fairly consider that fact, and, likewise, counsel would have a legitimate right to comment thereon." *Id.* See also *People v. Adams*, 109 Ill. 2d 102, 120-21 (1985) ("The defendant volunteered this story in his statement to the police and injected McClaine's name into

his defense. Because the defendant's story was contradicted on many details, McClaine's testimony became important to his case. *** The locating of McClaine presumably was under the control or within the knowledge of the defendant, and she could have testified to a vital matter of Adams' defense. It was not error for the prosecutor under the circumstances to have commented on the nonproduction of McClaine.").

¶ 38 In this case, both defendant and Bradley testified that Michael Hatcher was present at the scene and as to his role in the events that transpired. Therefore, the prosecutor could legitimately comment on the absence of Michael Hatcher's testimony. The prosecutor's comment also implied that Michael Hatcher's testimony would contradict defendant's version of events. "The State cannot comment on a defendant's failure to call a non-alibi witness to testify when the comment implies that the witness's testimony would have been unfavorable to the defendant, and when that witness is equally accessible to the State. ([Citation.]) A witness, however, is not equally available if he is likely to be biased against the State, for example, if that witness is related to the defendant." *People v. Enoch*, 189 Ill. App. 3d 535, 550 (1989). The prosecutor's comment was proper inasmuch as Michael Hatcher would likely have been biased against the State because he is defendant's uncle. See *Id.*

¶ 39 We hold that the State did not misstate the evidence and did not improperly argue facts not in evidence. Since we find no error occurred, there is no plain error. See generally *Sumler*, 2015 IL App (1st) 123381, ¶ 68.

¶ 40 B. Shifting the Burden of Proof and Testifying

¶ 41 Next, defendant argues the prosecutor shifted the burden of proof in multiple ways. First, by suggesting to the jury that defendant should have produced the gun from the shooting to support his defense, and second by suggesting what defense counsel should have asked the ballistics expert. Defendant argues the latter impropriety was compounded by the prosecutor

improperly offering his own opinion testimony as to what the ballistics expert would have said in response to the questions the prosecutor said defendant should have asked. "Improper argument by the prosecution shifting the burden of proof to a defendant constitutes reversible error, notwithstanding the fact that the jury is otherwise properly instructed on the burden of proof." *People v. Lopez*, 152 Ill. App. 3d 667, 677 (1987).

¶ 42 First as to the missing gun, the prosecutor argued during rebuttal as follows:

> "MR. VALENTINI [Assistant State's Attorney]: He has this great theory about a different shooter. Well, we have two bullets found in this case. One in Jeremy Harris's head, one in Michael Martin's body. They're at the crime lab. They're here. He was the last person with the gun. He's telling you today he didn't shoot either one of them. Bring the gun in.
>
> MR. BURCH [defense attorney]: Objection, judge.
>
> THE COURT: Sustained.
>
> MR. VALENTINI: Where is the gun? Where is the gun? It would have been nice to have been able to compare that gun to the bullets.
>
> MR. BURCH: Judge, objection.
>
> THE COURT: The objection will be overruled. Go ahead.
>
> MR. VALENTINI: He lied about why he stopped shooting. He told you he started shooting, because he was scared, but he stopped shooting because he was scared. This is not funny, but that's laughable. He stopped shooting because there were no bullets left to fire."

¶ 43 As shown above, defendant preserved this alleged error for review. Defendant argues that although the trial court sustained defense counsel's objection to the prosecutor's statement "Bring the gun in," the trial court failed to cure the prejudice to defendant from that statement

because it did not also instruct the jury to disregard that statement—an error that defendant argues was later compounded by the court's overruling of the objection to the prosecutor's subsequent statements about the gun. Our court has consistently held that "[g]enerally, a trial judge's prompt action in sustaining an objection will be sufficient to cure the error of an improper comment." *People v. Edgecombe*, 317 Ill. App. 3d 615, 622 (2000) (citing *People v. Arman*, 131 Ill. 2d 115, 127 (1989) (same)). Other courts have held that "[w]here a timely objection is made in response to an improper remark made before the jury, the trial court can often cure any error by sustaining the objection *or* instructing the jury to disregard the comment." (Emphasis added.) *People v. Lewis*, 269 Ill. App. 3d 523, 526-27 (1995). Defendant cites no authority stating that a contemporaneous instruction to disregard is required to cure the prejudice when an objection to an improper comment is sustained. Defendant did not suffer prejudice from prosecutor's comment "Bring the gun in" because the trial judge promptly sustained defense counsel's objection. In *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 65, the prosecutor argued as follows in rebuttal argument: "And we were never able to match the defendant's gun to this bullet because we don't have the defendant's gun. It's never been analyzed. *** We don't have that." (Internal quotation marks omitted.) The defendant in *Cosmano* argued that the prosecutor's comment improperly shifted the burden of proof to him. The court disagreed finding that the "prosecutor did not suggest that [the] defendant was under a duty to present evidence or to abandon his right against self-incrimination." *Id.* ¶ 68. Rather, "the subject of [the] defendant's failure to produce a gun, *** or his failure to explain the absence of the gun was a 'legitimate subject of comment by the prosecution' during rebuttal closing argument. [Citation.]" *Id.* ¶ 68. (Citing *People v. Williams*, 40 Ill. 2d 522, 529 (1968)). The fact there was evidence in *Cosmano* that the defendant in that case was the registered owner of the gun is irrelevant. The *Cosmano* court based its decision on *Williams*, which held that "if

other evidence tends to prove the guilt of a defendant and he fails to bring in evidence within his control in explanation or refutation, his omission to do so is a circumstance entitled to some weight in the minds of the jury, and, as such, is a legitimate subject of comment by the prosecution." *Williams*, 40 Ill. 2d at 529. The prosecutor's comments: "Where is the gun? Where is the gun? It would have been nice to have been able to compare that gun to the bullets," were proper.

¶ 44 Next, defendant argues the prosecutor shifted the burden of proof when he argued that the defense should have asked the ballistics expert certain questions in support of a defense argument at trial, then erred again by stating what the expert's testimony would have been. In addition to the gunshot wound to the deceased, police also discovered a bullet hole in a downspout on a home near the shooting. Defendant's trial attorney argued that the two bullet holes, the one in the head of the deceased and the one in the downspout, were not the same size, which suggested they may have been fired from different guns, corroborating defendant's theory there was another shooter. The prosecutor argued:

> "MR. VALENTINI [Assistant State's Attorney]: Well, there is no magic bullet in this case, and apparently defense wants to tell you that there's two big things that show that there was a second shooter.
>
> One that Jeremy Harris was shot in the back of the head, and two that the size of the bullet the size of the hole in the back of his head is different than the size of the hole in a piece of plastic on a *** downspout. Well, for anyone to suggest that to you based on the argument made today suggest to you that a verdict in this case should be based on that is an insult to your intelligence. One hole was made in a piece of downspout. The other was made in a human skull.

> They are not going to be the same size. They put a crime lab expert on the stand. Melissa Malley (phonetic) is an expert in firearms and ballistics and bullets and guns and the size of holes made by bullets. If they wanted to make that argument, they could have asked her that question. You know what she would have said when bullets hit plastic or downspouts, they're going to make different size holes than bullets that hit a human skull."

¶ 45 The State responds the prosecutor's comment was a direct response to defense counsel's argument, that defendant's claim there were two shooters is supported by the fact the size of the bullet holes do not match, and a proper argument pointing out that no testimony or expert opinion supported the defense's conclusion based on the discrepancy in the sizes of the holes.

¶ 46 In *People v. Giraud*, 2011 IL App (1st) 091261, ¶ 11, the defendant denied that during a conversation with police he admitted having sexual contact with his daughter. The defendant testified he suffered from diabetes, high blood pressure, and HIV, he had not eaten breakfast before he left with the officer when he was arrested, and had not taken his medication. When he spoke to police he was feeling bad and his vision was blurry. *Id.* When shown his signatures on a written statement, the defendant testified several of them did not look like his signature. *Id.* "During closing arguments, defense counsel highlighted the fact that defendant testified as to his having diabetes, his poor eyesight, and his lack of food prior to giving his written statement. In rebuttal closing arguments, the prosecutor commented that although the defendant testified as to all his medical conditions, he did not call his doctors to corroborate his testimony or lend credibility to his testimony." *Id.* ¶ 12. On appeal the defendant argued the prosecutor's comments in rebuttal improperly shifted the burden of proof to the defendant "by asking the jury

to consider the fact that [the] defendant failed to present a doctor to corroborate his claims that his diabetic condition rendered his statement to police unreliable." *Id.* ¶ 37.

¶ 47 The *Giraud* court began by noting that "[a] prosecutor may respond to comments by defense counsel which clearly invite a response. [Citation.] [C]omments made in closing argument must be considered in the proper context by examining the entire closing arguments of both the State and the defendant. [Citation.]" *Id.* ¶ 43. The "context" of the statement about which the defendant complained on appeal was the defendant's attorney's closing argument and the prosecutor's response. The court held that in responding the prosecutor did not improperly shift the burden of proof to the defendant. *Id.* ¶ 46. The court found that "the prosecutor was merely commenting on the evidence presented at trial and reasonable inferences drawn therefrom." *Id.* ¶ 47. The court concluded that "[h]ere, the *** argument only reflected on the quality and credibility of the evidence that [the] defendant presented. [Citation.] The comments made by the prosecutor, when viewed in the entire context of the closing arguments, do not reach to such a level as to be construed as inflammatory or a flagrant threat to the judicial process." *Id.*

¶ 48 In this case, we hold that the prosecutor's comment that: "They put a crime lab expert on the stand. Melissa Malley (phonetic) is an expert in firearms and ballistics and bullets and guns and the size of holes made by bullets. If they wanted to make that argument, they could have asked her that question," similarly reflected on the quality and credibility of the evidence that defendant presented.

¶ 49 Defense counsel showed the jury photographs of the two bullet holes and argued "they don't match." Just like the *Giraud* defendant's claims of illness, defendant in this case offered no expert testimony to, in the words of the prosecutor in *Girarud*, "back it up." *Id.* ¶ 45. This despite clearly having the opportunity to do so through the ballistics expert, who defendant

called as a witness. The prosecutor was responding to defense counsel's argument and pointing out the poor quality of the evidence in support of defendant's argument and its lack of credibility. The prosecutor's argument was not improper. *Id.* ¶¶ 46, 47.

¶ 50 Defendant also argues the prosecutor improperly offered his own unsworn testimony in lieu of competent evidence as to what the ballistics expert would say had she been asked about the sizes of the bullet holes. The State responds the prosecutor's statements that bullets make a different sized hole when they hit a person's skull than when they hit a piece of plastic "was nothing more than a reference to common knowledge" and "asking the jury to draw the common sense conclusion about what a bullet hole in each would look like."

¶ 51 "A prosecutor may not argue facts not in evidence." *People v. Wetzel*, 308 Ill. App. 3d 886, 896 (1999) (citing *Burrows*, 148 Ill. 2d at 170). In *Wetzel*, "the prosecutor tried to explain away the shell casing that could not be tied to [the defendant's] gun" by arguing that if the jury were to go to the area of the shooting "I bet we would recover a whole lot of discharged casings." (Internal quotation marks omitted.) *Id.* The *Wetzel* court had already determined the case had to be remanded for a new trial but went on to address issues that might recur, including the prosecutor's comment. *Id.* at 895-96. Concerning the argument about finding additional unrelated shell casings the court simply stated: "We expect this argument will not be repeated should this case be tried again." *Id.* at 896.

¶ 52 In this case defendant argues the prosecutor's comments about what the ballistics expert would have said about bullet holes is similarly improper where there was no testimony from the ballistics expert about the sizes of any bullet holes in the case. The State claims the comments in this case are nothing like those in *Wetzel* because the comment in this case discussed a subject of common experience or common sense.

> "It has been held that prosecutors may discuss subjects of common experience or common sense in closing argument as well. [Citation.] Indeed, since this court has acknowledged that jurors do not leave their common sense behind when they enter court ([citation]), it would seem proper for prosecutors to couch arguments in those terms and make appeals thereto." *People v. Runge*, 234 Ill. 2d 68, 146 (2009).

¶ 53 In this case the prosecutor did not couch his argument in terms of the jurors' common sense and make an appeal thereto. Rather, he affirmatively stated what an expert witness would have said in response to a specific question. "Assumptions and statements of fact which are not based upon evidence admitted at trial may not properly be argued to the jury. ([Citation.]) *** Such arguments and comments effectively assert the prosecutor's own unsworn testimony in lieu of competent evidence." *People v. Rogers*, 42 Ill. App. 3d 499, 502-03 (1976). In this case there was no evidence of what the expert would have said about the sizes of the bullet holes. The prosecutor's statements specifically as to how the ballistics expert would have testified were improper. Nonetheless, misconduct in closing argument warrants reversal and a new trial only if the improper remarks constituted a material factor in a defendant's conviction. *Wheeler*, 226 Ill. 2d at 123. "[T]he verdict must not be disturbed unless it can be said that the remarks resulted in substantial prejudice to the accused, such that absent those remarks the verdict would have been different. [Citation.]" *People v. Woods*, 2011 IL App (1st) 091959, ¶ 42. We do not believe that the prosecutor's improper remark, specifically that the ballistics expert would have testified that the same sized bullet makes a larger hole in plastic than in a human skull, was a material factor in defendant's conviction.

¶ 54 First, the comment was isolated. "[A] significant factor in reviewing the impact of a prosecutor's allegedly improper comments on a jury verdict is whether the comments were

isolated and brief within the context of a lengthy closing argument. [Citation.]" *Id.* ¶ 42. The prosecutor in this case did not belabor the point of what the expert would have said had defense counsel asked her about the differently sized bullet holes. We also note that the prosecutor properly argued that defendant did not elicit testimony to support his theory about the sizes of the bullet holes (*Giraud*, 2011 IL App (1st) 091261, ¶ 45), and could have made the argument that a bullet fired into plastic would make a larger hole than the same sized bullet fired into a human skull as a matter of common sense (*Runge*, 234 Ill. 2d at 146). Examining the complained of remarks with those findings in mind, we see that the improper portion was insignificant in the context of the comments about the hole in the downspout and even less so in the entire rebuttal argument:

> "They are not going to be the same size. They put a crime lab expert on the stand. Melissa Malley (phonetic) is an expert in firearms and ballistics and bullets and guns and the size of holes made by bullets. If they wanted to make that argument, they could have asked her that question. You know what she would have said when bullets hit plastic or downspouts, they're going to make different size holes than bullets that hit a human skull."

¶ 55 Second, evidence of defendant's guilt was overwhelming. See *Gonzalez*, 388 Ill. App. 3d at 597-98 (finding challenged prosecutorial remarks were not of such a magnitude that the defendant was denied a fair trial where the evidence of the defendant's guilt was overwhelming). Multiple eyewitnesses identified defendant as the shooter. Other than defendant's own testimony, the evidence that someone else fired a shot first was weak. Bradley was impeached by her statement to police and the argument concerning the sizes of the bullet holes is not very persuasive, especially given the lack of testimony to support it. Ellis explained away his statement from which defendant attempts to infer a second shooter. We do not believe the

verdict would have been different had the comment about how the ballistics expert would have testified not been made.

¶ 56 Finally, defense counsel's argument regarding the sizes of the bullet holes did not consume a large portion of his closing argument:

> "MR. BURCH [defense attorney]: There was someone else out there with a gun. And we're going to talk about Charles Harper, Little Charles, but in one instance the State wants you to believe that this fourth and fifth picture that was just shown to you and you will have an opportunity to look at there was a bullet hole on the side of a house in a gutter.
>
> And those are important because those would have been east of where Mr. Hatcher was supposedly shooting from so if he is shooting from that direction, how could he have shot someone that was facing him in the back of the head? It's impossible. Another reason why those bullet holes are important and this is his theory, look at the size.
>
> There is a scale, and you will be able to see this scale, and I would ask that you—you'll have an opportunity to examine this, but look at the scale of the size of this hole. Look at the scale of the size of this hole, and what do you know about this hole? You heard Detective Ford. Well, he said, this looks a little bit bigger than what a .22 would have made.
>
> Then I would ask that you look at the size of the bullet hole that was found on Mr. Hatcher. [*Sic*] They don't match. They don't match and if it's not reasonable from either listening to Ms. Johnson's testimony that he was facing Mr. Hatcher and therefore Mr. Hatcher could not have shot him in the back, if that's reasonable, and they haven't explained how that would have happened, then

> they have not met the first proposition that they talked about. They have not met that burden beyond a reasonable doubt."

Several pages later, defense counsel began to sum up:

> "MR. BURCH [defense attorney]: If you don't believe that it was the same caliber—if you believe that Kenneth Hatcher was shooting towards that house, and you don't believe when you look at the pictures and you look at the size of the two different bullet holes, if you don't believe that those are the same gun, the same caliber bullet, and that means different guns, then the State hasn't met their burden."

¶ 57 It does not appear this evidence was a material factor in defendant's conviction. The bulk of defense counsel's closing argument focused on which party was the initial aggressor in the confrontation between "the Millers" and "the Hatchers." This error was unpreserved. "[I]n accordance with the plain-error rule, we will reverse only if the State's comments were so inflammatory or so flagrant that defendant was denied a fair trial." *People v. Euell*, 2012 IL App (2d) 101130, ¶ 22. The prosecutor's comment was error, but that error did not deny defendant a fair trial.

¶ 58 C. Disparaging Defense Counsel and Defendant

¶ 59 Next, defendant argues that during rebuttal the prosecutor made numerous arguments "disparaging defense counsel and suggesting the defense theory of self-defense had been fabricated" by defense counsel. Defendant relies primarily on the prosecutor's line of argument pointing out that no witnesses mentioned a second shooter in interviews with police, including defendant, at any time prior to trial. Defendant argues the prosecutor made an outright accusation defense counsel suborned perjury when he put defendant on the stand to testify about a second shooter. "The State may challenge a defendant's credibility and the credibility of his

theory of defense in closing argument when there is evidence to support such a challenge. [Citation.] It is well established, however, that [*u*]*nless based on some evidence*, statements made in closing arguments by the prosecution which suggest that defense counsel fabricated a defense theory, attempted to free his client through trickery or deception, or suborned perjury are improper. [Citations.] (Emphasis in original.) [Citations.]" *People v. Kirchner*, 194 Ill. 2d 502, 549 (2000).

¶ 60 The State responds the prosecutor's attacks on defendant's credibility were proper because they were based on the evidence. *Id.* In this case, defendant testified he lied to police in Indiana about the last time he was in Chicago. There was also evidence, pointed out by the prosecutor during rebuttal, that defendant's behavior was inconsistent with his assertion of self-defense. "It is not inappropriate to call the defendant a liar if the record supports that assertion." *People v. Beltran*, 2011 IL App (2d) 090856, ¶ 69 (citing *People v. Rivera*, 262 Ill. App. 3d 16, 27 (1994)). We agree that the prosecutor's attacks on defendant's credibility were proper, including the numerous instances when the prosecutor expressly called defendant a "liar."

¶ 61 The State argues the prosecutor's remarks were leveled against defendant and not the defense attorneys, as evidenced by the fact the prosecutor pointed out that the defense attorneys did not mention the alleged second shooter in opening statements. We agree that most of the comments defendant cites as supposedly attacking defense counsel are directed at defendant and the lack of credibility of his theory of defense. For example, the prosecutor's comment that "defendant's lawyer is telling you that there's a second shooter," and that statement being based on "the defendant's testimony yesterday," is an attack on defendant's credibility and the credibility of his defense theory, not an accusation defense counsel fabricated the defense. The prosecutor clearly stated that defense counsel's argument was based on *defendant's* testimony. See *Id.* ¶ 69 ("The State's argument that the defense 'came out of thin air' was equivalent to

referring to the defendant as a 'liar.' "). The prosecutor also attacked the lack of persuasive corroboration of defendant's theory of defense. Those arguments were not improper. See *Kirchner*, 194 Ill. 2d at 550 ("we interpret the challenged comments as a criticism of defendant's credibility rather than an attack on defense counsel"); *Tijerina*, 381 Ill. App. 3d at 1037 (attacking theory of defense "typically removes a prosecutor's comments from consideration as prejudicial").

¶ 62 However, the State fails to directly address that portion of the rebuttal argument that was directly aimed at defense counsel at trial. The prosecutor stated defense counsel knew what defendant would say and asked: "Did they put on perjured testimony?" With that statement, the prosecutor went too far. *Emerson*, 97 Ill. 2d at 499 (finding error in comment "which, in effect, purports to charge counsel with fabrication of a defense bordering on subornation of perjury").

¶ 63 Even in this context the improper comment does not result in automatic reversal. See *People v. Ferns*, 247 Ill. App. 3d 278, 290 (1993) ("this case, unlike *Emerson*, was an overwhelming one for the prosecution, and the single comment by the prosecutor to which an objection was sustained was the only error"); *People v. Starks*, 287 Ill. App. 3d 1035, 1042 (1997) ("In *Emerson*, unlike this case, the People made additional disparaging comments when they went on to describe the smoke screen as composed of lies and misrepresentations and innuendos *** [stating] all defense attorneys try to 'dirty up the victim.' The People's comment in this case does not rise to the level of disparaging the integrity of the defense as found in *Emerson*. In light of this fact and considering the court instructed the jury that the comment was withdrawn, we find that defendant was not prejudiced by the People's remark." (Internal quotation marks omitted.)). In *Ferms* and *Starks*, the trial court sustained objections to the improper comments. "A trial court may usually cure any prejudice arising from improper

argument by promptly sustaining an objection to the challenged comment and giving a proper jury instruction. [Citation.]" *Campbell*, 2012 IL App (1st) 101249, ¶ 42.

¶ 64 In this case however, defense counsel did not object to the "perjury" comment, thus the trial court did not have an opportunity to cure the remark. Regardless of a defense objection, "[i]n reviewing a prosecutor's challenged comments, this court will consider the closing and rebuttal arguments as a whole and 'will find reversible error only if the defendant demonstrates that the improper remarks were so prejudicial that real justice was denied or that the verdict resulted from the error.' [Citation.]" *Id.* ¶ 38. We find defendant was not prejudiced by the improper remark. See *Id.* ¶ 42.

¶ 65 "A significant factor in determining the impact of an improper comment on a jury verdict is whether the comments were brief and isolated in the context of lengthy closing arguments." (Internal quotation marks omitted.) *People v. Hayes*, 409 Ill. App. 3d 612, 625 (2011). In *Hayes*, the improper comments were statements by the prosecutor minimizing the seriousness of finding the defendant guilty of second degree murder and commenting on possible sentences. *Id.* at 624. The court held that "[a]lthough the State's comment was not proper, the comment was brief and isolated." *Id.* at 625. "Additionally, this was not a closely balanced case and defendant has failed to show that the isolated comment was material to his conviction." *Id.* The court concluded the discussion about the comment as follows:

> "Based on our consideration of the whole of rebuttal closing argument, we cannot say that defendant has shown that he was substantially prejudiced by the brief and isolated comments by [the] prosecutor, and thus, the alleged error was harmless. Although we believe that the prosecutor should not have used the language in question, we cannot find that defendant has shown substantial prejudice such that

the verdict would have been different had the prosecutor not made the remark. [Citation.]" *Id.* at 626.

¶ 66 We reach the same conclusion in this case. We reiterate that the prosecutor's attacks on defendant's theory of defense were proper. The only offending comment occurred when the prosecutor stated defense counsel knew what defendant would say and asked: "Did they put on perjured testimony?" That single comment in a lengthy closing and rebuttal argument did not prejudice defendant. Defendant has not demonstrated that the verdict would have been different had the prosecutor not made that remark. A case is not closely balanced just because the defense version of events differs from the State's version and the accounts are equally consistent with the physical evidence. *People v. Lopez*, 2012 IL App (1st) 101395, ¶ 88 (citing *People v. Naylor*, 229 Ill. 2d 584, 606-07 (2008)). "Evidence of flight is admissible as tending to demonstrate a defendant's consciousness of guilt. [Citation.] *** The inference of guilt which may be drawn from flight depends upon the knowledge of the suspect that the offense has been committed and that he is or may be suspected. [Citation.]" *People v. Moore*, 2015 IL App (1st) 140051, ¶ 26. Once raised, "the State has the burden of proving beyond a reasonable doubt that defendant did not act in self-defense. [Citation.] The elements of self-defense are that (1) unlawful force was threatened against a person, (2) the person threatened was not the aggressor, (3) the danger of harm was imminent, and (4) the use of force was necessary." *People v. Bryant*, 325 Ill. App. 3d 448, 453 (2001).

¶ 67 The prosecutor argued the evidence demonstrating defendant's knowledge the offense had been committed and, consequently, his knowledge he was suspected. The evidence was not closely balanced on the issue of whether defendant acted in self-defense. The evidence that another individual fired first was weak. In addition to his own testimony, defendant relies on Bradley, who was impeached, and Ellis, who explained why he heard a shot before he saw

defendant's gun in a way that still had defendant firing first. Defendant's admission to firing the gun coupled with his initial flight and the weak evidence of self-defense provide substantial evidence of his guilt. The prosecutor had no evidence defense counsel suborned perjury and his comment to that effect was improper. But defendant did not suffer substantial prejudice from it, so the comment does not warrant reversal of the conviction.

¶ 68 D. Other Improper Comments

¶ 69 Next, defendant argues this court should consider the cumulative effect of the prosecutor's having (i) improperly vouched for the State's witnesses' credibility when the prosecutor argued the witnesses were genuine in their appearance and manner because they were not rehearsed in their testimony and were telling the truth; (ii) offered an improper personal opinion, not based on evidence, that an innocent person would have produced the gun allegedly used for self-defense; (iii) commented solely for purposes of inflaming the jury that (a) defendant was arrested in a limousine (on his way to a party) suggesting defendant should be convicted because he is a bad person, and (b) invoked the jury's sympathy for the victims by saying they had to wake up each day reminded of the shooting; and (iv) suggested defendant participated in other crimes or bad acts by suggesting that contrary to his testimony defendant must have had prior experience shooting guns because defendant fired about six shots and hit four people, which was (a) not based on facts in evidence and (b) meant to inflame the passions of the jury.

¶ 70 Where a defendant is not prejudiced in the sense that the outcome of the trial would have been different but for the prosecutor's improper remarks, defendant is still deprived of a fair trial where his substantial constitutional right to a fair, orderly, and impartial trial conducted according to law have been affected to such a degree that his trial was not fundamentally fair. *People v. Libberton*, 346 Ill. App. 3d 912, 933 (2003). The cumulative effect of prosecutorial misconduct may deprive a defendant of a fair trial. *Id.* Under such circumstances, the court is

not solely concerned with prejudice to the defendant's case, but with the due process rights guaranteed by the federal and state constitutions. *People v. Blue*, 189 Ill. 2d 99, 138 (2000). Thus "when a defendant's right to a fair trial has been denied, this court must take corrective action so that we may preserve the integrity of the judicial process" regardless of the strength of the evidence of the defendant's guilt. *Id.*

¶ 71 The State responds defendant forfeited review of these allegedly improper comments, none of them individually have merit, and, consequently, defendant's assertion of cumulative error is meritless. Specifically, the State responds the prosecutor permissibly (i) articulated the factors that made the witnesses credible, (ii) argued defendant's flight as consciousness of guilt, (iii) contrasted the surviving victims' reminders of their injuries with defendant's life after the crime as a brief comment related to properly admitted testimony, and (iv) argued evidence to the jury demonstrating why they should reject defendant's testimony as incredible.

¶ 72 (i) Vouching

¶ 73 "[P]rosecutors are not permitted to vouch for the credibility of a government witness nor are they permitted to use the credibility of the state's attorney's office to bolster a witness's testimony. [Citation.]" *People v. Williams*, 2015 IL App (1st) 122745, ¶ 12. "[C]ourts should use a commonsense approach to determine whether the statements convey to a reasonable juror that the prosecutor believes that a witness is credible based on the prosecutor's personal knowledge, other information not contained in record, or that the testimony is credible because it has the approval of the government." *Id.* ¶ 20.

¶ 74 In closing argument defendant's attorney attempted to paint Michael Martin as the initial aggressor. Defendant's attorney stated: "When they were confronted at the bus stop, who was the initial aggressor then? *** You heard Michael Martin. He was saying, ***. You saw his demeanor in court. What would you suspect he was saying as they were walking away." Later

defense counsel asked: "Well, did Kenneth Hatcher, Michael Hatcher confront them, or were they confronted by the Martins and the group that they were with?" Defendant's attorney later continued: "Who was the initial aggressor? Who was being aggressive? You had an opportunity to look at the people that testified by their mannerism, who was the aggressor?" Defense counsel continued:

> "[W]hat would an individual do in the face of an angry Michael Martin? The State described him as a 15-year-old. You saw his demeanor. You saw his demeanor in court while he's in the custody of the County jail. You saw his demeanor and if this demeanor was like that in court in front of a judge in front of you in front of the sheriff, what was it like on his block when he was mad when he was snapping when he was angry? What was his demeanor then? He come to you, I wasn't angry. I had my hands to my side."

¶ 75 In *People v. Hensley*, 2014 IL App (1st) 120802, ¶ 65, the defendant argued that the prosecutor "improperly argued during rebuttal closing argument that the crossing over of the State's witnesses from the underworld into our world made them more credible," inflaming the passions of the jurors. The State argued it properly commented on the credibility of the witnesses and that defense counsel invited such a reply by calling the State's witnesses liars and incredible. *Id.* The court, after reviewing the closing arguments in their entirety, held that "defense counsel attacked the credibility of the State's witnesses based on their history and section of society." *Id.* ¶ 68. The court noted that "when defense counsel provokes a response, the defendant cannot complain that the prosecutor's reply denied him a fair trial." *Id.* (citing *People v. Hudson*, 157 Ill. 2d 401, 445 (1993)). The court held that the "State, in accordance with defense counsel's provocation, addressed the society of its witnesses and argued why they should be found credible despite their background. We find no reversible error here because

defense counsel's closing argument invited the State's response that defendant now claims to be improper." *Id.*

¶ 76 The situation in this case is remarkably similar. Defense counsel attached Michael Martin based on his demeanor in court. This provoked a response from the State to argue that its witnesses', particularly Michael Martin's, demeanor made them more credible because they were being genuine, not polished and rehearsed witnesses for the prosecution. We find no error in the prosecutor's arguments concerning the State's witnesses' credibility.

¶ 77 (ii) Personal Opinion

¶ 78 To conclude his rebuttal, the prosecutor argued as follows:

> "MR. VALENTINI [Assistant State's Attorney]: In their opening statement the defense said that words caused Jeremy Harris' death. Words could never do this. Words make people mad. Words cause arguments. They might even cause fist fights, but when you bring a gun to a fist fight as he did, this is what happens. This is not from words. This is from a bullet, a bullet that came from his gun, a gun he disposed of and hid and through his words and testimony hides to this day from you.
>
> Innocent people don't do that. He's guilty of murder."

¶ 79 We have already addressed defendant's argument that the prosecutor shifted the burden of proof by suggesting to the jury that defendant should have produced the gun from the shooting to support his defense, and we found it lacked merit. *Supra* ¶ 43. Defendant argues these comments were "not a reasonable inference from the evidence." We disagree. The evidence was that defendant took the gun back to his uncle's apartment, then, allegedly, defendant does not know what happened to the gun. The jury could reasonably infer defendant disposed of the gun, especially when coupled with his flight. See *People v. Benedik*, 56 Ill. 2d 306, 309 (1974)

("The circumstantial evidence against the defendant was substantial. If the jury disbelieved his testimony, as they were entitled to do, they could reasonably have reached the conclusion that the physical evidence, the nature of the wounds on Kresmery's body, the defendant's attempt to hide the bodies and destroy other evidence, his flight and his apparent motive established his guilt beyond a reasonable doubt. It is not necessary that the jury disregard the inferences which naturally flow from this evidence, nor is the trier of fact 'required to search out a series of potential explanations compatible with innocence, and elevate them to the status of a reasonable doubt.' [Citation.]"). We find no error in these comments by the prosecutor.

¶ 80 (iii) Inflaming the Jury

¶ 81 The State is not allowed to characterize the defendant as an "evil" person. *People v. Herndon*, 2015 IL App (1st) 123375, ¶ 44. The State may, however, "comment unfavorably on the evil effects of the crime." *Id.* Moreover, "the prosecutor is generally given wide latitude in commenting about the nature of the crime and the character of the defendant. ([Citation.]) The prosecutor is also privileged to draw any unfavorable inferences from the evidence and use them in denouncing the accused." *People v. Agee*, 85 Ill. App. 3d 74, 87 (1980). In closing argument (not rebuttal), the prosecutor's complained-of argument was as follows:

> "MS. GIANCOLA [Assistant State's Attorney]: He walked down to his house, dip the gun, and fled, fled to South Bend, Indiana, and while Jeremy Harris' family is dealing with the loss of her son, Sharonique [*sic*], Michael, and Jamica had to wake up every day reminded of this shooting because they still had bullets in their body and bullet fragments in their body.
>
> This defendant is partying it up in South Bend, Indiana, gets arrested in a limo heading to a party. That shows you what kind of person the defendant is."

¶ 82 We find the prosecutor's comments to be no more than unfavorable comments on the evil effects of this crime (in that three victims were forced to live with bullets lodged in their bodies) as well as the character of the defendant (in that he could apparently move on with his life without remorse). In *People v. Holloway*, 119 Ill. App. 3d 1014, 1021 (1983), the defendant argued that the prosecutor's closing argument was inflammatory when the prosecutor referred to the defendant as a "ghoul." The court held that "[i]n view of the fact that [the] defendant admitted that both he and Adams were armed with golf clubs, that he struck Ms. Lazzari once or twice, that he rummaged through the apartment, found several half-dollar coins and entertained lady friends at dinner that same evening, it appears that these remarks were supported by the record and did not have any bearing on the jury's verdict." *Holloway*, 119 Ill. App. 3d at 1021.

¶ 83 In this case, the prosecutor's comments are supported by the evidence and were not improper. We also cannot say that the isolated statement concerning the circumstances of defendant's arrest and asking the jury to determine how that demonstrates his character after committing a brutal crime substantially prejudiced defendant so as to deprive him of a fair trial. "In claiming that prejudicial argument was used in his prosecution, a defendant has to show that his rights were substantially prejudiced. He must show that the questionable language, considered in light of all the evidence of guilt, was a material factor in the conviction and that the verdict or finding would have been different had the language not been used." *People v. Smith*, 6 Ill. App. 3d 259, 263 (1972). Had the prosecutor not used the language quoted above we have no doubt the verdict would not have been different. Defendant was not prejudiced.

¶ 84 (iv) Other Crimes

¶ 85 Finally, defendant argues there was no evidence in the record that defendant ever used a gun before, therefore the prosecutor's argument suggesting the contrary was improper. Defendant also argues the prosecutor improperly suggested defendant had committed other

crimes. "[P]rosecutors are afforded wide latitude to comment on the relevant evidence as well as any fair and reasonable inferences therefrom. [Citation.] 'However, it is improper for the prosecutor to suggest that a defendant has been engaged in other criminal activity for which he is not on trial.' [Citation.] Reversible error may be found in a closing argument where the defendant can establish that but for the particular comment, the verdict would have been different." *People v. Ramos*, 396 Ill. App. 3d 869, 874 (2009). The prosecutor argued as follows:

> "MR. VALENTINI [Assistant State's Attorney]: He lied about never having fired a gun before and not aiming at people. How is that possible? People join the military have to be trained on how to use guns. They just don't give them guns, go out there and shoot somebody. Let's hope you hit them. People join law enforcement, and they have to learn how to point and aim and shoot guns. This guy's story to you is he had never touched a gun before, ever. He had certainly never fired a gun, didn't even know if it was loaded. He wasn't even aiming at people.
>
> And remarkably, incredibly fires about six shots and hits four people, two in the back, both right in the middle of their body. He lied to you about not moving the gun around. He claim [*sic*] all he do [*sic*] is pick up the gun and shoot I don't know how many times.
>
> Well, that's not what the physical evidence tells you. He shot this way and blasted a window out of a car. He shot that way and shot a hole in a downspout next to the house. He shot that way and shot Jeremy Harris in the back of the head. He was aiming that gun, and had gun [*sic*] aim too."

¶ 86 In *People v. Howell*, 358 Ill. App. 3d 512, 522 (2005), the defendant complained that the prosecutor "improperly implied that the defendant had committed other crimes" by stating, *inter alia*, " 'that when he commits a crime he will be held accountable like anybody else'; and *** '[w]e can't even begin to imagine what she's gone through and what her life is like to have ever lived with that defendant being able to find her whenever he wanted to.' " *Id.* at 522. The *Howell* court found that with the second comment, the "prosecutor did not ask the jury to hold the defendant responsible for the commission of other crimes. She asked the jury to hold the defendant responsible for committing the crimes charged in the present case." *Id.* at 523. The court found that the third comment did not imply that the defendant had committed other crimes. *Id.* "This comment was a reasonable inference from *** testimony that *** the defendant [had been seen] at [the victim's] home on many previous occasions and, therefore, he could 'find [her] whenever he wanted to.' [Citation.] *This fact was relevant to both of the crimes charged in this case*." (Emphasis added.) *Id.*

¶ 87 In this case, we similarly find that the prosecutor did not ask the jury to hold defendant accountable for any other crimes, and we find no implication in the prosecutor's statement that defendant committed other crimes. Defendant is correct that there was a suggestion he had fired a gun before. That does not necessarily imply defendant had committed a crime before. Although there was no direct evidence that defendant had fired a gun, the prosecutor's implication that defendant had experience with guns and was a "good shot" was a reasonable inference from the evidence that defendant intentionally shot at and struck four individuals. That fact is relevant to the crimes charged in this case. "A prosecutor has great latitude in closing argument and may argue fair and reasonable inferences drawn from the evidence at trial." *Jackson*, 2012 IL App (1st) 102035, ¶ 18. See also *People v. Romero*, 387 Ill. App. 3d 954, 972 (2008) (finding prosecutor's comment referring to the defendant as an "experienced knife

fighter" was not error where "as the prosecutor pointed out in closing rebuttal argument, the nature of [the victim's] wounds—even in the midst of the excitement of the incident, defendant was able to stab [the victim] twice 'in the core of [his] body'—could certainly support an inference that defendant was capable in handling the knife."). We hold that the prosecutor's comments were not improper.

¶ 88 We have found the prosecutor made two improper comments but those comments did not prejudice defendant. *Supra* ¶¶ 57, 64. Therefore, we need not address whether the cumulative effect of the comments denied defendant a fair trial. As we have found no prejudice to defendant, we cannot find that cumulatively, the prosecutor's comments "created a pervasive pattern of unfair prejudice to defendant's case." *Blue*, 189 Ill. 2d at 139. "Moreover, the facts of this case are not so closely-balanced and the specific comments not so egregiously prejudicial that we need consider this issue under the doctrine of plain error." *People v. Fry*, 256 Ill. App. 3d 434, 438 (1993). Defendant was not prejudiced and the prosecutors' comments did not threaten the integrity of the judicial process. Defendant also cannot satisfy the second prong of the *Strickland* test for ineffective assistance of counsel because he was not prejudiced by counsel's failure to preserve the allegedly improper comments for review. See generally *People v. Kite*, 204 Ill. App. 3d 955, 960 (1990) ("we could not consistently find that Kite was prejudiced by counsel's failure to object and so the second prong of the *Strickland*/*Albanese* test is not met"). Reversal is not warranted.

¶ 89 E. *In Camera Voir dire*

¶ 90 Finally, we turn to defendant's argument that the trial court deprived him of his right to a public trial by conducting a portion of the *voir dire* in chambers. "[S]ince the development of trial by jury, the process of selection of jurors has presumptively been a public process with exceptions only for good cause shown." *Press-Enterprise Co. v. Superior Court of California*,

*Riverside County*, 464 U.S. 501, 505 (1984). "Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness." *Id.* at 509. "The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Id.* at 510. "Absent consideration of alternatives to closure, the trial court could not constitutionally close the *voir dire*." *Id.* at 511.

> "To preserve fairness and at the same time protect legitimate privacy, a trial judge must at all times maintain control of the process of jury selection and should inform the array of prospective jurors, once the general nature of sensitive questions is made known to them, that those individuals believing public questioning will prove damaging because of embarrassment, may properly request an opportunity to present the problem to the judge *in camera* but with counsel present and on the record." *Id.* at 512.

¶ 91 Defendant argues the trial court violated his right to a public trial when it examined eight potential jurors *in camera* despite the fact only one requested to speak to the judge in private, without making a finding that any of them had an overriding interest that could be prejudiced by open proceedings, and without considering alternatives to closure. Defendant admits failing to object but argues the issue is not forfeited for this court's review because (1) the issue is not forfeited even when a defendant has not asserted the right because the trial court has an independent obligation to ensure open proceedings, and (2) the record does not demonstrate defendant made a knowing and intelligent waiver of his right to an open trial. Alternatively, defendant argues the issue is reviewable under the plain-error rule.

¶ 92 The State relies primarily on this court's decision in *People v. Jones*, 2014 IL App (1st) 120927, ¶¶ 39-40, which held that where a defendant fails to object to a judge's questioning of potential jurors in chambers the issue is forfeited on appeal, and which found the issue did not satisfy the second prong of the plain-error test.[1] The *Jones* court found the limited *in camera voir dire* in that case did not affect the fairness of the defendant's trial or challenge the integrity of the judicial process because the right to a public trial is not absolute and "a temporary closure may, under certain circumstances, not violate the sixth amendment because it was 'too trivial' to amount to a violation. [Citation.]" *Id.* ¶ 42. To determine whether a temporary closure amounts to a violation, the court "examines the trial court's acts and the effects upon the trial to determine whether a defendant was denied the sixth amendment protections enumerated in *Waller* [*v. Georgia*, 467 U.S. 39, 46 (1984)]." [Citation.]" *Id.* ¶ 42. In *Waller*, the Court stated that the right to a public trial "is for the protection of the accused and is designed to: (1) ensure a fair trial; (2) encourage the prosecution and the trial court to carry out their duties responsibly; (3) encourage witnesses to come forward; and (4) discourage perjury." *Id.* ¶ 41 (citing *Waller*, 467 U.S. at 46). The *Jones* court found in that case "the values underlying the sixth amendment right to public trial that were expressed in *Waller* were not significantly undermined. *Id.* ¶ 45. "Therefore, the trial court did not abuse its discretion in briefly questioning [two potential jurors] outside the presence of the remaining venirepersons, and in any event, the closure here was too trivial to implicate the sixth amendment." *Id.* ¶ 45.

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[1] "The plain error doctrine allows a reviewing court to bypass normal forfeiture principles and consider an otherwise unpreserved error affecting substantial rights when either: '(1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence.' [Citation.]" *People v. Jones*, 2014 IL App (1st) 120927, ¶ 40. We have already held the evidence in this case is not closely balanced. *Supra* ¶ 67.

¶ 93 In this case the State argues defendant forfeited the issue for review by failing to object. Additionally, the alleged error does not amount to plain error because the closure was "too trivial to amount to a violation" in that none of the four concerns articulated in *Waller* were implicated. Defendant argues *Jones* is wrongly decided. Defendant does not argue that any of the *Waller* factors were implicated by the trial court's limited *in camera voir dire*. "According to Rule 341(h)(7), points not argued in the appellant's brief are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing. [Citation] (quoting Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013))." *People v. Polk*, 2014 IL App (1st) 122017, ¶ 49.

¶ 94 We see no compelling reason to depart from this court's decision in *Jones*. Defendant forfeited the issue of the trial court's limited closing of *voir dire* to the public. Defendant has pointed to nothing to demonstrate that the manner in which the trial court proceeded undermined the values expressed in *Waller*. Accordingly we find no sixth amendment violation.

¶ 95 CONCLUSION

¶ 96 For the foregoing reasons, the circuit court of Cook County is affirmed.

¶ 97 Affirmed.