2016 IL App (1st) 140651-U

SIXTH DIVISION
SEPTEMBER 23, 2016

No. 1-14-0651

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 12 CR 2268
	)	
TAIWAN SMITH,	)	Honorable
	)	Thomas Hennelly,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Rochford and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant's conviction for second degree murder is affirmed. The introduction of rebuttal testimony that repeated the defendant's prior inconsistent statements to police did not result in prejudice. Further, the defendant's trial counsel's failure to request a jury instruction regarding the lack of a duty to retreat by one who is not an initial aggressor did not constitute ineffective assistance of counsel. Finally, the prosecutor's comments did not cause substantial prejudice.

¶ 2 The defendant-appellant Taiwan Smith appeals from his conviction for second degree murder. We find his contentions to be without merit and affirm his conviction.

¶ 3 BACKGROUND

¶ 4 An altercation at a Chicago nightclub known as the Victor Hotel on the night of December 24, 2011, resulted in the shooting deaths of two individuals, including a security guard

named Robert Warren. An acquaintance of the defendant, Jose Duckins, was also shot and killed by a different security guard, Craig Reed. The defendant was charged with two counts of first degree murder for the deaths of Warren and Duckins. Following a jury trial, the defendant was convicted of second degree murder with respect to Warren.

¶ 5 At the December 2013 trial, the State called Antwan Sidney, who was the Victor Hotel's head of security. On the night of the shooting, the nightclub's security included Antwan, his cousin Tyjuan, Reed, Warren, and Larry Underwood. Another individual, Donnell Moody, was also working at the club as a security guard at the time, although Moody was employed by a promoter rather than the nightclub.

¶ 6 Antwan estimated that there were about 200 people at the club on the night of December 24, 2011. Around midnight, he was alerted to a disturbance involving a group of six or seven men, including the defendant and Duckins. Duckins was "intoxicated" and "acting kind of rowdy." Antwan spoke to the group, who "agreed they would calm down." Later that evening he ran into the defendant and had a short conversation. The defendant complimented the club, and Antwan and the defendant exchanged telephone numbers.

¶ 7 At approximately 1:30 a.m., Antwan was told that there was a fight. Near the club entrance, he saw six or seven men, including security guards, involved in a "melee." Antwan attempted to assist in breaking up the fight. In the struggle, he was knocked down within an enclosed canopy area that separated the front entrance of the club from the outside.

¶ 8 After he fell, Antwan recalled hearing a gunshot. He then saw the defendant with a gun and "sparks flying from the gun." He recalled that the defendant was pointing the gun at a person on ground, whom he later learned was Warren. Antwan testified that the defendant was "literally right over" Warren, only one or two feet from him.

¶ 9 Antwan was then grabbed and pulled inside the club, but he heard several additional gunshots. Antwan spoke with police later that night, and the next day identified the defendant in a line-up as the shooter. Antwan denied seeing anyone else with a gun.

¶ 10 Moody testified that on the night of the shooting, he had been stationed in a foyer between the front door and the interior of the club, where he watched the collection of entrance fees from club patrons. Moody recalled that around 1:30 a.m., he saw other security guards attempting to remove a group of patrons who were "drunk and unruly" by escorting them through the foyer area to the club entrance. Moody recalled that when the group neared his station, the customers "refused to leave and started swinging and started fighting" with security staff, after which additional security guards also became involved. Moody recalled that the defendant was "one of the first ones involved" in the fight.

¶ 11 Moody attempted to help move the group outside; he described the scene as a "melee" which migrated from the foyer into the canopy area. Moody recalled that he was attempting to defend Antwan during the fight in the canopy area, when he heard gunfire. Through a window in the canopy, he saw "muzzle flashes" and saw the defendant firing toward the club. Moody grabbed Antwan and pulled him back into the club.

¶ 12 Moody also recalled pulling Reed, another security guard, back into the club. He recalled that Reed began screaming that "one of our brothers" had been shot, after which Reed kicked open the front door and went outside. Moody did not see Reed again that night.

¶ 13 The next morning, Moody viewed a line-up at the police station and identified the defendant. He testified that at the time of the line-up, he "was like 80 percent sure" that the defendant was the shooter.

¶ 14 The State next called Officer Oscar Serrano. On the night of the incident, he and his partner, Officer John McKenna, were on patrol when they received a report of a shooting and a description of a male black suspect wearing a gray jogging suit. About 2:30 a.m., he observed the defendant, who matched the description of the shooter. After the officers approached the defendant, the defendant tossed a handgun to the ground and ran. Officer McKenna chased him down an alley and eventually detained him. The officers recovered a semiautomatic 9-millimeter handgun from the area where they had seen the defendant drop a weapon.

¶ 15 The State next called Reed, who had been stationed as a guard at the front door of the Victor Hotel, checking IDs as patrons entered the club. Reed recalled that Warren was assigned near him, in the canopy area adjacent to the club entrance.

¶ 16 Reed recalled that between 12 and 1 a.m., another security guard alerted Reed and Warren of a problem in the dance floor area. Inside the club, Reed recalled seeing four men, including the defendant, who "looked drunk." Reed told them that they had to leave the building. He recalled that the men did not want to leave and that they slowed down in the foyer area as they were being escorted out of the club. Reed continued to urge them to leave. At one point, the defendant reached up and touched Reed's neck. After Reed "knocked his hand down," a "commotion" started. Reed recalled it was "chaotic" as he and other security guards attempted to get the defendant and his friends to the front door. He recalled dragging Duckins toward the door. The defendant told him to stop dragging Duckins. Reed told the defendant "you started all this, man, get out of here." He then saw the defendant leave the club.

¶ 17 Reed continued to struggle to clear the doorway of club patrons, and he fell to the ground, just outside the canopy area. Reed then saw the defendant running toward the club with a gun in his hand. Reed also saw Warren in the street in front of the club.

¶ 18 Reed testified that the defendant approached Warren from behind and shot Warren at very close range, less than a foot. Warren dropped to the ground.

¶ 19 After Warren was shot, Moody pulled Reed back into the club and closed the door. However, Reed got back up, kicked the door open and went outside. Reed claimed he saw the defendant "standing over" Warren with his gun still pointed down at Warren. At that point, Reed pulled out a .32 caliber revolver from his coat, and began to shoot at the defendant. Reed testified that the defendant looked in his direction and ran away, while shooting back towards Reed and the club. Reed continued to shoot at the defendant until he lost sight of him.

¶ 20 Meanwhile, Reed testified that he saw Duckins approaching the club. He heard Duckins yell a profanity at Reed, and recalled that Duckins' arm was "swinging" towards him. Reed testified that, believing Duckins could have a gun, he reacted by shooting Duckins once in the chest. By that time, the defendant had left the scene.

¶ 21 After shooting Duckins, Reed went to Warren, who was struggling to breathe, and called 911. He stayed at the scene until Warren was placed in an ambulance. However, when police arrived, Reed "panicked" and went home. Reed admitted that he later "dumped the gun" down a sewer.

¶ 22 Approximately one week later, Reed learned that police were looking for him, and he contacted a lawyer. After Reed and the State reached an immunity agreement, Reed testified before a grand jury about the incident on January 12, 2012. Later, on January 26, 2012, Reed directed police to a sewer where he believed he had left his revolver.

¶ 23 On cross-examination, Reed admitted that it was against the nightclub's policy for security guards to be armed, and that he had been carrying a gun illegally. He also admitted that

he had not told anyone at the scene that he had shot Duckins. Reed also acknowledged that he had never been interviewed by Chicago police about the incident.

¶ 24 The State next called Larry Sims, who said he had known the defendant for over 10 years, and that Duckins was his best friend. Sims testified that on the night of the shooting he drove to the Victor Hotel with Duckins, Sims' brother Donnyl, and another relative, Damoni Sims. Inside the club, he saw the defendant and another man, Roosevelt Dickens.

¶ 25 Later that night, Sims was told that his friends were being kicked out of the club. Near the front entrance, he saw that Duckins and Donnyl were being dragged out by two security guards. Larry tried to help his friends, recalling he "grabbed one of the bouncers and like told him I had him, I got him" and "pushed [the bouncer] off my friend." Sims testified that "a big tussle" followed, during which he was pushed through the canopy and outside the club.

¶ 26 After exiting the club, Sims heard gunshots behind him. He turned around and saw a "big melee," as well the defendant standing with a gun in his hand, which was pointed downward. However, Sims denied seeing anyone lying on the ground, and denied seeing the defendant shooting. Sims hid behind a car, where he heard shots from two different guns.

¶ 27 The following day, Sims spoke with police and identified the defendant in a line-up. He maintained at trial that he had not actually seen the defendant shooting. However, Detective Michael Kennedy, as well as Assistant State's Attorney Kelly Grekstas, subsequently testified that on December 25, 2011, Sims had stated that he saw the defendant shooting in the direction of the club.

¶ 28 Eric Szwed, a forensic investigator with the Chicago police department, testified that one fired bullet, four bullet fragments, and 13 cartridge cases were recovered from the scene of the shooting. Mark Pomerance, a forensic scientist with the Illinois State Police, testified that all 13

cartridges, the fired bullet recovered from the scene, as well as three of the four bullet fragments, were fired from the 9-millimeter handgun recovered when the defendant was arrested. Separately, a .32 caliber bullet was recovered from Duckins' body, which originated from a different weapon.

¶ 29 The State next called Detective Gregory Jacobson, who had spoken to Moody, Tyjuan, and Antwan at the scene on the night of the shooting. Antwan told Detective Jacobson that he had seen someone in a gray jogging suit pointing a gun at a person on the ground, about 10 feet from the canopy in front of the club.

¶ 30 Detective Jacobson later learned that about three miles away, police had arrested a subject armed with a 9-millimeter handgun who fit the shooter's description. On December 25, 2011, he went to the station and spoke with defendant, who was wearing a gray hooded sweatshirt and gray sweat pants. Jacobson requested that a gunshot residue test be performed on the defendant.

¶ 31 Detective Jacobson brought Moody to the police station to view a line-up, where Moody stated that he was "80 to 90 percent sure" that the defendant was the person he saw shooting in front of the club.

¶ 32 On January 11, 2012, Detective Jacobson met with Reed and his attorney. The next day, Reed testified before a grand jury. On January 26, Reed pointed out a sewer to indicate where he believed he had dumped his revolver. Detective Jacobson located a revolver in a different sewer opening on the same block.

¶ 33 On cross-examination, Jacobson acknowledged that police had learned of Reed's involvement in the incident only after speaking to another individual, John Edwards, on January

4, 2012. Detective Jacobson agreed that Reed had not otherwise been interviewed by police about the shooting.

¶ 34 The State next called Dr. Ariel Goldschmidt of the Cook County Medical Examiner's office, who had performed Warren's autopsy. He testified that Warren had suffered two gunshot wounds. One bullet had entered the left side of his back, injured his left lung and heart, and exited the abdomen. Another bullet had entered and exited Warren's left thigh.

¶ 35 On direct examination, he agreed that the gunshot wound to the back was "consistent with someone being shot from six inches away." However, on cross-examination, Dr. Goldschmidt acknowledged that his autopsy report for Warren had stated that the back wound was a distance range gunshot wound. He testified that his initial opinion had been based on the absence of stippling marks or soot near the entrance wound, which would be indicative of a close-range wound. He acknowledged his opinion had changed when he met with prosecutors, who had pointed out that Warren was wearing four layers of clothing at the time of the shooting. Dr. Goldschmidt opined that those layers of clothing could have obscured stippling marks that would otherwise be found with a close-range wound. Thus, he admitted that he could not say conclusively whether the gunshot to Warren's back was fired from close range.

¶ 36 Dr. Goldschmidt also performed an autopsy on Duckins, who had died of a single gunshot wound in the chest. A bullet was recovered from the body and provided to police.

¶ 37 The State next called Tyjuan Sidney, Antwan's cousin, who was also a security guard at the club on the night of the shooting. Tyjuan recalled a disturbance with a group of five or six men, including Duckins and the defendant, who were partying a "little too hard." Tyjuan recalled that Duckins was "out of control drunk" and twice warned his friends to calm Duckins down.

¶ 38 Tyjuan recalled that he and two other security guards eventually told that the group they had to leave, and began walking the group toward the door. Midway through the corridor, Duckins stopped, indicated he did not want to leave, and tried to return to the inside of the club. One of the security guards grabbed Duckins, and one of Duckins' friends tried to pull him away from the security guard. Tyjuan recalled that Duckins "took a swing" at the security guard, after which "chaos" broke out as the security guards tried to push the group out the door. Tyjuan recalled seeing Warren grab Duckins, pulling him outside to the street. As he was outside facing the entrance to the club, Tyjuan heard shots behind him. He ran back into the club, without seeing the shooter. After Tyjuan's testimony, the State rested its case in chief.

¶ 39 The defense first called Detective Eugene Schleder, who had briefly interviewed Moody at the police station on December 25, 2011. Schleder testified that Moody had not told him that he pulled Reed back into the club, that Reed had yelled that Warren had been shot, or that he had seen Reed go back outside.

¶ 40 The defense also called John Edwards, who testified that he had known Reed for several years. He recalled that on the night of the shooting, Reed sent him a text message that something had happened at the Victor Hotel. Later that night, Edwards drove to Reed's home. He testified that Reed was crying and told Edwards that "somebody shot Rob." About a week later, Reed asked Edwards if he knew someone who would buy his gun, and offered to sell it to Edwards.

¶ 41 The defendant elected to testify. He recalled that on the night of the incident, he was with a group including Duckins, Roosevelt Dickerson, Donnyl Sims, Demoni Sims, and Larry Sims. The defendant further stated that the group also included a man known as "Kapete," but that he did not know Kapete's real name.

¶ 42 After the group drank alcohol at Duckins' house, they proceeded to the Victor Hotel, where they continued drinking. The defendant and the other members of his group became drunk, especially Duckins. He recalled one of the security guards telling the group that they needed to "get him under control."

¶ 43 He recalled that security guards approached the group about Duckins a second time and said to either "get him under control or you all just take him home and then you all are allowed to come back." The defendant recalled having a "friendly conversation" with Antwan during which he told Antwan "we would get him under control." The defendant and Antwan exchanged numbers at that time.

¶ 44 Later, after another disturbance involving Duckins, the group was told to leave by the security guards. The defendant recalled that the group was walking toward the exit when two or three other security guards, including Reed, came in from the outside toward the group. He recalled that Reed "started getting aggressive with [Duckins]" and pulling him towards the exit.

¶ 45 The defendant's group and several security guards started pushing and shoving, which escalated into a fistfight. The fighting moved to the canopy area, and then continued outside the club. At that point, the defendant claimed, he saw Reed pull out a gun from his coat pocket, and he heard a gunshot.

¶ 46 In the meantime, according to the defendant, he saw that Kapete had dropped a gun as he was "tussling" with another security guard. The defendant testified that he picked up Kapete's gun "in fear for my life and my friends' life." According to the defendant, Reed saw the defendant and shot at him. The defendant began to run away while he returned fire with Kapete's gun. He testified that as he was running away, Reed chased him and continued to shoot. The

defendant denied that he was "aiming" at anyone, but testified that he pointed the gun behind him and fired it as he ran from the scene. He did not see anyone get shot.

¶ 47 The defendant recalled that when he was approached by police later that night, he "panicked" and ran, at which time the gun "fell." The defendant acknowledged that when he was first interrogated following his arrest, he initially lied to the police because he was "scared."

¶ 48 On cross-examination, the State asked the defendant about his videotaped answers to questioning by Detective Jacobson on the day following the shooting. Over defense counsel's objection, the court agreed to permit the State to play excerpts of the videotaped interrogation during its cross-examination, and to then ask the defendant about those excerpts.

¶ 49 The defendant admitted that when he was arrested, he initially told Detective Jacobson that he did not remember any shots being fired at the club, and had denied having a gun. The defendant further acknowledged that, in the videotaped excerpts played before the jury, he had denied possessing or firing a gun. The defendant also admitted that he subsequently told Detective Jacobson that he fired his gun before Reed pulled out his gun. The defendant also acknowledged that he had told Detective Jacobson that he only fired his gun into the air. He also admitted that, when Detective Jacobson had asked how he obtained the gun, he had not mentioned Kapete. The defendant testified that "I lied to [Detective Jacobson] because every time I explained the story to him, telling him, he didn't want to believe me."

¶ 50 The defendant specifically denied walking up to Warren and shooting him. On redirect examination, he acknowledged that a bullet from his gun had killed Warren, but claimed he was not aiming at anyone when he fired as he ran from the nightclub.

¶ 51 Following the defendant's testimony, the state called Detective Jacobson as a rebuttal witness. Detective Jacobson's rebuttal testimony included the following questions about his

interview with the defendant on December 25, 2011, which form the basis of the defendant's primary argument on appeal:

> "Q: Talk about the first 4 hours, from approximately 9:30 till 1:30 during that conversation with him. Did the defendant ever mention any person by the name of Kapete?
>
> [Defense counsel]: Objection, not impeaching.
>
> THE COURT: Overruled.
>
> THE WITNESS: No, he did not.
>
> [State's attorney]: Did the defendant ever tell you during the conversation, that conversation, that the bouncer was the one who fired first?
>
> A: No he did not.
>
> [Defense counsel]: Objection, also not impeaching, judge.
>
> THE COURT: Overruled.
>
> [State's attorney]: Who did the defendant tell you was the one who fired first?
>
> [Defense counsel]: Same objection.
>
> THE COURT: Same ruling.
>
> THE WITNESS: The defendant, Taiwan Smith."

Jacobson's rebuttal testimony was the last evidence presented at trial.

¶ 52 Following Jacobson's rebuttal testimony, counsel and the court conferred regarding jury instructions. The parties agreed to include a modified form of Illinois Pattern Jury Instruction, Criminal, No. 24-25.06, regarding justification for using force in self-defense. The jury was thus

instructed: "A person is justified in the use of force when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force. However, a person is justified in the use of force which is intended or likely to cause death or great bodily harm only if he reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself."

¶ 53 In addition, the State requested inclusion of Illinois Pattern Jury Instruction, Criminal, No. 24-25.09 (IPI 24-25.09), regarding an initial aggressor's duty to attempt to retreat or withdraw before using force. Over defense counsel's objection, the court agreed. Thus, the jury was also instructed that:

> "A person who initially provokes the use of force against himself is justified in the use of force only if the force used against him is so great that he reasonably believes he is in imminent danger of death or great bodily harm, and he has exhausted every reasonable means to escape the danger other than the use of force which is likely to cause death or great bodily harm to the other person; or he in good faith withdraws from physical contact with the other person and indicates clearly to the other person that he desires to withdraw and terminate the use of force, but the other person continues or resumes the use of force."

¶ 54 However, the State did not seek inclusion of Illinois Pattern Jury Instruction, Criminal, No. 24-25.09X (IPI 24-25.09X), which states that "A person who has not initially provoked the use of force against himself has no duty to attempt to escape the danger before using force against the aggressor." The defendant's counsel also did not request this instruction.

¶ 55 In closing arguments, the State argued to the jury that, based on the witnesses' collective testimony, "you come to one conclusion. That the defendant is the first one out there firing. Executed Robert Warren in the middle of the street and that [he] fired towards Craig Reed and Craig Reed fired back at him. That's the evidence in this case."

¶ 56 Later, in arguing that the jury should reject any claim of self-defense, the prosecutor stated:

> "The court is going to instruct you that a person is justified in the use of force when *** he reasonably believes that such conduct is necessary to defend himself against the imminent use of unlawful force. However, a person is justified in use of force *** only if he reasonably believed that such force is necessary to prevent imminent death or great bodily harm to himself or another.
>
> *** [D]id the defendant believe that he had to kill Robert Warren to defend himself against the imminent use of unlawful force[?] It's preposterous. He shot a man in the back. In the back. At a downward angle. A 6-foot-2 or 3-inch man, weighed over 300 pounds, he shot him in the back at a downward angle. He needed to do that in order to defend himself? The evidence is preposterous."

¶ 57 At several other points during the State's argument, the defendant's counsel objected. Upon these objections, the court reminded the jury that the attorneys' arguments were not evidence, and that it should disregard attorney statements not supported by the evidence.

¶ 58 In the defendant's closing argument, his counsel argued that he had unintentionally shot Warren "as he was protecting himself against Craig Reed," who was "the aggressor." Counsel argued that the defendant fired his gun "only after Craig Reed shot it first and he shot it only to defend himself. And as he was running away, he accidentally shot and killed Robert Warren."

¶ 59 Following closing arguments, the jury was instructed that it could find the defendant guilty of "type A" first degree murder for Warren's death, "if in performing the acts which caused the death, he intended to kill or do great bodily harm to that individual or another, or he knows that such acts will cause death to that individual or another, or he knows that such acts create a strong probability of death or great bodily harm to that individual or another." The jury was also instructed that it could find the defendant guilty of the lesser offense of second degree murder with respect to Warren, if it additionally found the mitigating factor that the defendant believed the circumstances to be such that they justified the deadly force he used, but that his belief was unreasonable.

¶ 60 With respect to Duckins' death, the jury was instructed that that it could find the defendant guilty of "type B" first degree murder only if it first found that the State proved that the defendant committed the offense of first degree murder of Warren, and that Duckins' death was a direct and foreseeable consequence of a chain of events set into motion by Warren's murder.

¶ 61 During deliberations, the jury submitted a question asking, with respect to the mental state for first degree murder, if the State must prove that the defendant had "intent or knowledge specific to Robert Warren, or is it a question of intent or knowledge that someone would die or be hurt[?]" The court determined that the jury should be instructed that the requisite intent or knowledge could apply to Warren "or another," and instructed the jury accordingly.

¶ 62 On December 18, 2013, the jury returned a verdict finding the defendant guilty of second degree murder of Robert Warren. The defendant was acquitted of the murder charge relating to Duckins.

¶ 63 On February 3, 2014, the defendant's motion for new trial was denied. On the same date, the court sentenced the defendant to 28 years in the Illinois Department of Corrections.

¶ 64 ANALYSIS

¶ 65 We note that we have jurisdiction as the defendant perfected a timely notice of appeal. See Ill. S. Ct. R. 606(a), (b) (eff. Feb. 6, 2013).

¶ 66 On appeal, the defendant raises three claims of error that he believes warrant reversal and a new trial: (1) Detective Jacobson's rebuttal testimony should not have been permitted because it repeated evidence of the prior inconsistent statements the defendant had already acknowledged on cross-examination; (2) that his trial counsel was ineffective by failing to request jury instruction IPI 24-25.09X regarding the lack of a duty to retreat by one who is not an initial aggressor; and (3) that the prosecutor's closing argument misstated the evidence and misrepresented the defendant's claim of self-defense.

¶ 67 We first examine the defendant's claim that he was denied a fair trial by the admission of Detective Jacobson's rebuttal testimony. That testimony reiterated that, in his initial conversations with police, the defendant had not mentioned Kapete as the source of the gun, and that the defendant stated that he (rather than Reed) fired the first shot.

¶ 68 The defendant argues that such rebuttal testimony was not proper since the defendant had already admitted making such prior inconsistent statements during his cross-examination. He urges that the repetition of the same prior inconsistent statements through Detective Jacobson's rebuttal "had the harmful effect of allowing the jury to hear the same impeachment twice" which

"exacerbated the damage to [the defendant's] credibility." Thus, he claims the admission of Detective Jacobson's rebuttal testimony constitutes prejudicial error.

¶ 69 The defendant acknowledges that, although his attorney objected to the rebuttal testimony, the issue was not included in his post-trial motion and thus was not properly preserved. See *People v. Enoch*, 122 Ill. 2d 176 (1988). However, he urges that we review the issue under the plain error doctrine. As stated by our supreme court, "[t]he plain-error doctrine 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.]" *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). However, the first step in the plain error analysis is to determine whether an error occurred. *See id.* As explained below, we conclude that no prejudicial error occurred in the admission of the rebuttal testimony at issue.

¶ 70 "Rebuttal evidence is evidence that explains, repels, contradicts or disproves evidence presented by the other party. [Citation.] Whether to admit rebuttal evidence is a matter within the sound discretion of the trial court; and, on review, the court's decision to admit rebuttal evidence will not be disturbed absent a clear abuse of discretion. [Citation.]" *People v. Engle*, 351 Ill. App. 3d 284, 289-90 (2004). "A decision by the trial court permitting rebuttal testimony will not be reversed on appeal unless the trial court abused its discretion *and the defendant was thereby prejudiced.*" (Emphasis added.) *People v. Ross*, 100 Ill. App. 3d 1093, 1096 (1981); *People v. Egan*, 65 Ill. App. 3d 501, 511 (1978). Thus, our court has held that even when

rebuttal evidence was improperly allowed, its admission will not constitute reversible error, absent a reasonable probability "that the jury would have acquitted defendant absent the rebuttal testimony." *Engle*, 351 Ill. App. 3d at 289-90.

¶ 71 We are also mindful that our supreme court has instructed that "when deciding whether error is harmless, a reviewing court may (1) focus on the error to determine whether it might have contributed to the conviction; (2) examine the other properly admitted evidence to determine whether it overwhelmingly supports the conviction; or (3) *determine whether the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence*." (Emphasis added.) *People v. Becker*, 239 Ill. 2d 215, 240 (2010).

¶ 72 We conclude that, regardless of whether Detective Jacobson's testimony was proper rebuttal testimony, its admission was not prejudicial and thus does not warrant reversal. The defendant may be correct that the rebuttal testimony did not serve to repel or contradict testimony previously elicited, but was merely duplicative and cumulative. The brief testimony at issue simply confirmed that—as had already been elicited during the defendant's cross-examination—the defendant had not mentioned Kapete as the source of the weapon, and that the defendant had stated that he (not Reed) was the first to fire a shot. However, even if this was not proper rebuttal testimony, it clearly is not prejudicial so as to constitute reversible error.

¶ 73 The defendant urges that in light of the "closely balanced evidence as to how the shooting truly began," Detective Jacobson's rebuttal testimony "may have tipped the scales against [him]." We disagree with the defendant's assessment of prejudice, as we do not find a reasonable probability that the verdict would have been different, absent the rebuttal testimony at issue. The rebuttal testimony was quite brief, and simply restated evidence that had been properly elicited during the defendant's cross-examination. It is not reasonable to suggest that, out of the ample

evidence adduced at trial, that the brief repetitive rebuttal testimony "tipped the scales" against the defendant. Thus, we decline to find that the rebuttal testimony caused prejudice warranting reversal.

¶ 74 We next address the defendant's claim that his trial counsel was ineffective by failing to request IPI 24-25.09X, so as to instruct the jury that a non-aggressor does *not* have a duty to retreat before using force in self-defense. "To prevail on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defendant such that he was deprived of a fair trial. [Citations.] To establish prejudice, the defendant must show a reasonable probability that, absent counsel's alleged error, the trial's outcome would have been different. [Citation.] A reasonable probability of a different result is not merely a possibility of a different result. [Citation.] If the defendant fails to establish either prong, his ineffective assistance claim must fail. [Citation.]" (Internal quotation marks omitted.) *People v. Falco*, 2014 IL App (1st) 111797, ¶ 14.

¶ 75 "It is well settled in Illinois that counsel's choice of jury instruction, and the decision to rely on one theory of defense to the exclusion of others, is a matter of trial strategy. [Citation.] Such decisions enjoy a strong presumption that they reflect sound trial strategy, rather than incompetence, and therefore, are generally immune from claims of ineffective assistance of counsel. However, the failure to request a particular jury instruction may be grounds for finding ineffective assistance of counsel if the instruction was so critical to the defense that its omission denied the right of the accused to a fair trial." (Internal quotation marks omitted.) *Id.*, ¶ 16.

¶ 76 The defendant urges that, in light of his claim of self-defense, "it was crucial that the jury understand when one has a legal duty to retreat, which depends on whether the person using force in self-defense was the initial aggressor." He contends that "the jury received incomplete

instruction on that point of law, so it could not properly assess Smith's claim that he acted under a reasonable belief in the need for self-defense."

¶ 77 The defendant recognizes that the jury received IPI No. 24-25.09, describing an initial aggressor's duty to retreat. However, the defendant claims that the jury should also have received "the counterpart to that instruction" contained in IPI 24-25.09X, which states that a "person who has not initially provoked the use of force against himself has no duty to attempt to escape the danger before using force against the aggressor." He argues that his trial counsel's failure to ask for this instruction constituted ineffective assistance, as "the jury was not informed that if it found Reed to be the initial aggressor *** [the defendant] had the right to defend himself without first attempting to retreat."

¶ 78 We reject the ineffective assistance claim, as we find that the defendant has not demonstrated either deficient performance or resulting prejudice. First, we decline to find that the failure to request the instruction was deficient performance, as we do not find that "the instruction was so critical to the defense that its omission denied the right of the accused to a fair trial." (Internal quotation marks omitted.) *Falco*, 2014 IL App (1st) 111797, ¶ 16.

¶ 79 As the State points out, the defendant cites no authority suggesting that IPI 24-25.09X *must* be given whenever IPI 24-25.09 is given, or that a failure to request it when IPI 24-25.09 is given constitutes deficient performance. As recognized by our court, "[T]he committee note to IPI Criminal 4th No. 24-25.09X does not mandate that it be given whenever IPI Criminal 4th No. 24-25.09 is given. Rather, the note states that both instructions should be given in appropriate cases. The decision as to whether both instructions are appropriate, given the specific alleged facts of a case, is left to the trial court's discretion. [Citation.]" *People v. Alexander*, 408 Ill. App. 3d 994, 1002 (2011).

¶ 80 The defendant's reply brief recognizes that IPI 24-25.09X is not "mandated" whenever IPI 24-25.09 is given, but urges that this was "an appropriate case" for both instructions, "where the outcome turned on whether Reed or [the defendant] began firing first." Nonetheless, regardless of whether the instruction could have been "appropriate" had it been requested, we cannot say that the absence of this instruction was so critical that it deprived the defendant of a fair trial. This is especially the case since the jury was properly instructed as to the elements of first and second degree murder, as well as the justification defense. We find applicable the discussion from *Alexander*, where a defendant likewise claimed that the trial court erred in failing to give IPI 24-25.09X in conjunction with IPI 24-25.09:

> "[E]ven if we were to find that the trial court abused its discretion by failing to *sua sponte* give IPI Criminal 4th No. 24-25.09X, any error that occurred did not threaten the fundamental fairness of the trial. *** [A] determination of whether the defendant initially provoked the use of force was not an essential element of the charged crime or his claim of self-defense. The jury was instructed on the elements and burden of proof of first degree murder, second degree murder, and self-defense. Under the evidence presented *** the defendant's claim of self-defense hinged on the reasonableness of the defendant's use of force, not on whether he had a duty to escape before inflicting that force. Regardless of whether the jury believed that the defendant was the initial aggressor *** [t]he crucial question of the defendant's self-defense claim was whether his use of that force was reasonable in these

> circumstances. Thus, the trial court's failure to *sua sponte* instruct the jury under IPA Criminal 4th No. 24-25.09X did not direct the jury's finding as to an essential element in this case and did not create a risk that the jury misunderstood the applicable law." *Alexander*, 408 Ill. App. 3d at 1002-03.

¶ 81 The same reasoning applies with respect to the defendant's ineffective assistance of counsel claim. Thus, we do not find that his counsel's failure to request IPI 24-25.09X constitutes deficient performance.

¶ 82 Moreover, even assuming that the failure to request this instruction could be construed as deficient performance, we would not find prejudice. Especially as the jury was properly instructed as to justification, we cannot say that there is a reasonable probability that the jury would have acquitted the defendant, if it had heard the additional instruction that a non-initial aggressor has no duty to retreat. See *id.* at 1003 (rejecting ineffective assistance of counsel claim where "the defendant has not shown that he would have been found not guilty or that the jury would have found him guilty of the lesser offense of second degree murder if counsel had requested" IPI 24-25.09X); see also *People v. White*, 265 Ill. App. 3d 642, 675 (1994) ("[W]hen asserting an ineffective assistance claim the defendant may not merely claim that the jury 'might have' applied a duty to retreat when it considered his self-defense claim; such an argument is merely speculation. The defendant must show that, had such an instruction been given, there is a reasonable probability that the outcome of the trial would have been different.").

¶ 83 Regardless of whether the jury believed that the defendant or Reed was the initial aggressor, the "critical question of the defendant's self-defense claim was whether his use of *** force was reasonable." *Alexander*, 408 Ill. App. 3d at 1003. The defendant has not shown a

reasonable probability that the inclusion of the additional instruction would have caused the jury to find that he acted under a reasonable belief when he shot repeatedly in the direction of the club. Thus, the defendant has also failed to show the requisite prejudice to sustain his ineffective assistance of counsel claim.

¶ 84 Having rejected the defendant's ineffective assistance of counsel claim, we turn to the defendant's contentions that two improper comments in the prosecutor's closing argument warrant reversal. The defendant acknowledges that his trial counsel did not object to the comments at issue, and thus these alleged errors were not properly preserved. Thus, he urges that we review those comments under the plain error doctrine. We again note that the first step in the plain error analysis is to decide whether an error occurred. See *People v. Piatkowski*, 225 Ill. 2d at 565. However as explained below, we do not find error, as we cannot say that the challenged comments, either individually or cumulatively, resulted in substantial prejudice to the defendant.

¶ 85 "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). "A prosecutor's remarks will be

grounds for reversal only when they result in substantial prejudice to the defendant." *People v. DeSantiago*, 365 Ill. App. 3d 855, 866 (2006).

¶ 86 The defendant asserts two instances of improper commentary by the State in closing argument. First, the defendant takes issue with the prosecutor's statements that the defendant was "the first one out there firing," and that he "[e]xecuted Robert Warren in the middle of the street and that [he] fired towards Craig Reed and Craig Reed fired back at him. That's the evidence in this case." The defendant contends that these comments misstated the evidence as to whether Reed fired at the defendant before the defendant fired at him. The defendant emphasizes Reed's testimony that, after he saw the defendant shoot Warren in the back, it was Reed who first shot at the defendant, after which the defendant began shooting back at Reed. The defendant contends that the second degree murder verdict "indicates that [the jury] did not believe Reed's testimony that Smith initiated the gunfire by shooting Warren in the back" and that "[t]he jury evidently believed Smith's theory that Warren got shot while Smith and Reed were firing at one another." He argues that the "misrepresentation of the uncontested evidence *** may have contributed to the [jury] rejecting Smith's claim that he reasonably perceived a need to shoot in self-defense."

¶ 87 We acknowledge that Reed testified that, after the defendant shot Warren, he fired at the defendant, and then the defendant fired at Reed. However, considering the totality of the record, we do not find the prosecutor's comment so significant that it can be considered a material factor in the defendant's conviction or otherwise caused substantial prejudice.

¶ 88 The defendant's argument requires that we speculate as to which portions of the prosecutor's comments were accepted by the jury, and make corresponding inferences as to the jury's reasoning. The defendant's argument suggests that, based on the second degree murder

verdict, we can infer that the jury rejected the prosecution's theory that he intentionally "executed" Warren, but at the same time was improperly swayed by the prosecutor's suggestion—in the very same sentence of the closing argument—that the defendant fired at Reed before Reed fired at him. The defendant's argument invites us to conclude (1) that the jury improperly treated the State's closing argument as evidence as to who shot first, and furthermore (2) that the jury would have returned a not guilty verdict, had this statement not been made. We cannot speculate as to which parts of the evidence or which statements in closing arguments the jury did or did not accept.

¶ 89 Further, to the extent the prosecutor misstated the evidence, any potential prejudice was mitigated by the court's repeated admonitions to the jury that the attorneys' arguments were not evidence. See *People v. Desantiago*, 365 Ill. App. 3d 855, 866 (2006) ("[A] statement made during closing arguments constituting alleged prejudice to the defendant will be cured when the trial court subsequently instructs the jury that closing arguments are not evidence and that they should disregard any argument not based on the evidence.") In this case, the trial court instructed the jury about this principle before, during and after closing arguments.

¶ 90 Immediately prior to closing arguments, the court informed the jury: "What the lawyers say during these closing arguments is not evidence, should not be considered by you as evidence." The record reveals that, at four other points during the prosecutor's closing argument (in response to defense objections to other portions of the State's argument) the court reminded the jury that "what the lawyers say in closing argument is not evidence" and "anything the lawyers say that is not supported by the evidence is to be disregarded by you." Following closing arguments, the jury was again instructed that "Neither opening statements nor closing arguments are evidence." These repeated instructions further weigh against finding any

reasonable probability that this comment impacted the jury's verdict. Thus, we decline to find that it created substantial prejudice.

¶ 91 Separately, the defendant takes issue with a portion of the prosecutor's argument regarding the defendant's claim of self-defense:

> "[D]id the defendant believe that he had to kill Robert Warren to defend himself against the imminent use of unlawful force[?] It's preposterous. He shot a man in the back. In the back. At a downward angle. A 6-foot-2 or 3-inch man, weighed over 300 pounds, he shot him in the back at a downward angle. He needed to do that in order to defend himself? The evidence is preposterous."

The defendant argues that this comment "grossly mischaracterized Smith's claim of self-defense," in that the defendant had argued that he fired to defend himself from *Reed*, and did not claim that he was threatened by Warren. He also argues that the prosecutor "misstated the law because he misinformed the jury about the conclusion it would need to reach in order to acquit."

¶ 92 These arguments are without merit. We recognize that the defendant claimed that he was defending himself from Reed, not Warren. Nonetheless, the prosecutor could argue that the State's evidence undermined the defendant's narrative. "Generally, a prosecutor is given wide latitude in closing argument, although his or her comments must be based on the facts in evidence or upon reasonable inferences drawn therefrom. [Citation.] The prosecutor has the right to comment on the evidence and to draw all legitimate inferences deducible therefrom, even if they are unfavorable to the defendant." *People v. Hampton*, 387 Ill. App. 3d 206, 220 (2008).

¶ 93 In this case, the State presented evidence, including Reed's and Antwan's eyewitness testimony, that the defendant shot Warren at close range. The prosecutor was free to argue that such evidence was inconsistent with the defendant's claim that he inadvertently shot Warren as he ran away from the nightclub. In short, the State could argue that its evidence conflicted with the defendant's self-defense theory.

¶ 94 Moreover, we are not persuaded by the suggestion that this statement may have confused the jury about whether the defendant was claiming to defend himself from Reed or Warren. In closing argument, defense counsel clearly argued his theory of the case that Reed was the "aggressor" and that the defendant fired "only after Craig Reed shot it first and he shot it only to defend himself." Given defense counsel's argument, we find it highly unlikely that the challenged comment confused the jury about the nature of the self-defense claim.

¶ 95 Further, we reject the defendant's suggestion that, as a result of this comment, the jury was misled into believing that the defendant's actions could be legally justified only if he perceived a threat from Warren. Notably, the jury was correctly instructed as to the justification defense. See *Hampton*, 387 Ill. App. 3d at 221 (2008) (improper remarks may be cured by the trial court providing proper instructions on the applicable law). Based on our review of the record, including the totality of the closing arguments and jury instructions, we decline to find a reasonable probability that this comment misled the jury as to the applicable law, or otherwise caused substantial prejudice to the defendant. Further, even considering the cumulative effect of both challenged comments, we would not find substantial prejudice warranting reversal. See *People v. Whitlow*, 89 Ill. 2d 322, 341 (1982) (finding that cumulative impact of improper prosecutorial comments entitled defendants to new trial).

¶ 96 As we do not find that the challenged comments constitute reversible error, we need not further analyze them under the plain error doctrine as to whether the evidence was closely balanced, or whether the claimed errors deprived the defendant of a fair trial.

¶ 97 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 98 Affirmed.