

THIRD DIVISION  
September 21, 2016

No. 1-14-1355

**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. 11 CR 12551
	)	
RUBEN FLEMING,	)	Honorable
	)	Mary Margaret Brosnahan,
Defendant-Appellant.	)	Judge Presiding.

---

JUSTICE LAVIN delivered the judgment of the court.  
Presiding Justice Fitzgerald Smith and Justice Cobbs concurred in the judgment.

**O R D E R**

¶ 1 *Held:* Defendant's conviction of attempted first degree murder affirmed over defendant's contention that the State failed to prove him guilty beyond a reasonable doubt because the victim's eyewitness identification was unreliable. Defendant was not denied a fair trial as a result of the State's closing arguments. The matter is remanded for a new preliminary *Krankel* hearing (*People v. Krankel*, 102 Ill. 2d 181 (1984)) before a different judge and without the State's adversarial participation. Defendant's *mittimus* is corrected to reflect one additional day of presentencing credit.

¶ 2 Following a jury trial, defendant Reuben Fleming was convicted of attempted first degree murder<sup>1</sup> and sentenced based on his criminal background as a Class X offender to an aggregate term of 50 years' imprisonment. Defendant's sentence included a 20-year enhancement because defendant personally discharged a firearm.

¶ 3 On appeal, defendant contends that: (1) the State failed to prove him guilty beyond a reasonable doubt because the victim's eyewitness identification was unreliable; (2) he was denied a fair trial because the State engaged in prosecutorial misconduct during closing arguments; (3) we should remand for a new *Krankel* hearing (*People v. Krankel*, 102 Ill. 2d 181 (1984)) on his *pro se* posttrial motion alleging ineffective assistance of counsel because the State's participation in the preliminary hearing rendered it adversarial; and (4) we should correct his *mittimus* to reflect one additional day of sentencing credit. We affirm; remand for a *Krankel* hearing; and correct defendant's *mittimus*.

¶ 4 The evidence adduced at defendant's jury trial showed that defendant argued with the victim, Desmond James, after James, an employee of the city of Chicago, lawfully placed a "Denver boot" on the wheel of defendant's car. During their argument, defendant threatened James, called him pejorative names, attempted to punch him and swung a tree branch in James' direction on two separate occasions. Shortly after the argument, James saw defendant emerge from an alley and shoot in James' direction, striking him once in the back.

¶ 5 Defendant was arrested on July 27, 2011, in connection with the 2008 shooting of James. Defendant was subsequently charged by information with six counts of attempted first degree

---

<sup>1</sup> Although in his brief defendant argues that his convictions for aggravated battery with a firearm and attempted first degree murder must be reversed, we note that the record shows that defendant was found guilty of both, but, prior to sentencing, the court merged the aggravated battery count into the attempted murder count. The court sentenced defendant only on the attempted murder count and defendant's *mittimus* reflects this single count and sentence.

murder, one count of aggravated battery with a firearm and one count of aggravated discharge of a firearm. Prior to trial, the State moved to nol-pros all but one count each of attempted first degree murder and aggravated battery with a firearm.

¶ 6 At trial, James testified that in 2008 he worked for the city of Chicago, in the Department of Revenue, and was responsible for patrolling the city and looking for "boot-eligible vehicles." A boot is an immobilizing device placed on the wheel of a vehicle to keep it from moving. James drove a Department of Revenue van that was equipped with a roof-mounted camera and a computer, which together would read the license plate numbers of parked vehicles and alert him if a vehicle was boot-eligible.

¶ 7 On September 15, 2008, at about 10:35 a.m., James was assigned to the southeast side of Chicago and was alerted to a boot-eligible vehicle near 8406 South Dante Avenue. He exited his van and placed a boot on the wheel of an older model, gold colored Buick that was parked on the west side of the street. He then began completing forms that he was required to fill out after placing a boot on a vehicle. As he did so, a woman opened the door to the house in front of which the Buick was parked and said, "oh, he's getting a ticket." The woman stepped back inside the house to inform someone and then asked James why he was writing a ticket. James told her that he placed a boot on the vehicle because of unpaid parking citations.

¶ 8 Defendant then ran out of the house and asked James to "give him a break" and remove the boot. James said that he could not do so because he did not have the keys for it. Defendant tried to persuade James to remove the boot and James repeated that he was unable to do so without the keys. James gave defendant one of the forms that he had completed and told him whom to call for information about removing the boot. When defendant refused to accept the form, James placed it under the windshield wiper of the Buick. Defendant then became angry,

began to call James pejorative names and told him that he was going to "beat his b\*\*\* a\*\*\*." At this time, the woman placed herself between the two men and told defendant not to hit James. James testified that he saw defendant making a fist "like he wanted to strike me." Defendant swung his arm over the woman's head and tried to hit James. Defendant then picked up a tree branch and began swinging it in the direction of James, who walked backwards away from defendant. James walked to the corner of Dante Avenue and 84th Street, and radioed to his dispatcher that he needed police assistance.

¶ 9 As James stood on the corner, he saw defendant standing by the Buick, and heard a man's voice coming from the doorway of the house. The man told defendant "to get in the house, you [are] going to get in more trouble than you're already in." Defendant began to argue with the man. James then tried to walk back to his van. As he did so, defendant again picked up a tree branch and started walking towards James, who crossed the street. James radioed his dispatcher again and asked for police assistance. As he did so, James continued to watch defendant, who was wearing a white tee shirt and blue denim jeans, and standing by the Buick. Defendant then ran along the side the house and into a gangway. At this time, James lost sight of defendant.

¶ 10 A short time later, James, from a distance of 40 or 50 feet, saw defendant emerge from an alley with his hand extended towards him. James testified that there was nobody else around defendant and nothing blocking his view of defendant, who was wearing the same clothes he wore during their argument. James also testified that he did not know if defendant had something in his hand until he heard a "pop." At that time, James realized defendant had a gun. James turned away from defendant and ran east on 84th Street. As he did so, he heard two more gunshots. One of the shots hit James in the back, causing him to fall to the ground. James stood up and started "hopping" east on 84th Street because he was no longer able to use his left leg. As

he did so, James looked in the direction of the alley and did not see anyone. James testified that he was in a lot of pain and leaned against a tree because he was unable to go further.

¶ 11 About a minute later, James' supervisor, Greg Hampton, and a Chicago police officer arrived on the scene. James told them that he had been shot and gave the officer a description of the shooter. James told the officer that the shooter was a black male, wearing a white tee shirt and blue jeans. Shortly thereafter, an ambulance arrived and James was transported to Northwestern Memorial Hospital where he underwent emergency surgery to repair his small intestine. James testified that, on the same day, after the surgery, he spoke with detectives at the hospital and identified defendant from a photo array as the person who shot him. On July 15, 2009, James viewed a lineup at the police station on 111th Street and identified defendant as the person who shot him.

¶ 12 On cross-examination, James testified that he told the first responding officer who arrived on the scene that he had been shot and gave the officer a description of the man who shot him. James acknowledged that he did not tell the officer that he was involved in an argument with the man. James stated that he did not do so because "he called it into [his] dispatcher" and he was "sure [the officer] knew." James admitted that he did not tell the officer about the woman who exited the house nor did he direct the officer to the house. James also did not tell the officer that defendant ran through a gangway.

¶ 13 James acknowledged that he spoke with Detective John Otto at the hospital. James stated that he told Detective Otto that a woman came out of the house and asked him for a "break." Defendant then exited the house and began cursing at James. James told Detective Otto that an older man came to the doorway of the house and spoke to defendant, who then ran through the gangway. James also told Detective Otto that, prior to being shot, he saw defendant emerge from

an alley and saw his arm extended. Detective Otto asked James if he saw a gun and James told him that he did not. James told the detective that he saw defendant holding his "hand directly out" and then heard "sounds." James acknowledged that he told Detective Otto that after the shooting, he fled and did not see who shot him. James also acknowledged that on the date in question he told police he could not see who shot him. James stated that he knew who shot him because he was about 40 feet away from the person and got a good look at him.

¶ 14 On re-direct examination, James testified that he responded to the questions asked by the first responding officer at the scene and did not volunteer further information. James stated that he told Detective Otto that he did not see who shot him because, after he "saw defendant shoot the first shot," he turned and ran in the opposite direction. James acknowledged that he did not see a gun or fire coming out of the gun. On July 15, 2009, James spoke with a Detective Sullivan and told the detective that he saw defendant, near the alley, pointing in his direction. James denied that he told Detective Sullivan that he saw defendant shooting. James stated that he believed defendant shot him because he "heard it" and defendant had his arm extended toward him. James stated that defendant was pointing his arm at him when he was shot.

¶ 15 Sergio Martinez testified that on the date and time in question he was working on the roof of a house across the street from 8406 South Dante Avenue and saw two black men and one black woman arguing. Martinez did not see the men's faces and was unable to identify them. The two men were shoving each other and the woman was standing between them. One of the men appeared to be an employee of the city of Chicago. That man walked to the "side" of 84th Street. The other man had a tree branch in his hand. That man removed a license plate from a car and then went to the side of a house. Shortly thereafter, Martinez heard "more than two" gunshots.

¶ 16 Detective Otto testified that he arrived on the scene and learned that James, an employee of the city of Chicago, had been at the location placing a boot on a Buick. Detective Otto "ran" the license plate number of the Buick and learned that the number was registered to defendant. Detective Otto then went to the house at 8406 South Dante Avenue, but was unable to locate defendant. After completing his investigation at the scene, Detective Otto returned to Area 2 Police headquarters and compiled a photo array which included defendant.

¶ 17 Detectives Otto and Thomas Ayers went to the hospital and met with James after his surgery. James identified defendant from the photo array and placed his initials above defendant's photo. Detective Otto then completed an investigative alert for defendant, which electronically notified all officers within the Chicago Police Department that there was probable cause to arrest defendant for aggravated battery.

¶ 18 On July 15, 2009, an officer contacted Detective Otto and informed him that he had arrested defendant as a result of the investigative alert. Defendant was transported to Area 2 where James identified him from a lineup. Detective Otto then contacted an evidence technician to photograph the lineup and defendant. Detective Otto testified over defense counsel's objection that, when the evidence technician arrived, defendant refused to cooperate. Defendant sat on the ground and said he was not going to allow himself to be photographed. Detective Otto stated that defendant was not being aggressive, but was "passively resisting cooperation in the photograph." Eventually, officers lifted defendant from the ground for the photograph. Defendant was then released from custody pending further investigation. After interviewing Martinez, Detective Otto reactivated the investigative alert for defendant. An arrest warrant for defendant was also issued in September 2009. Defendant was arrested on July 27, 2011.

¶ 19 On cross-examination, Detective Otto acknowledged that when James identified defendant from the photo array he identified him as the person with whom he had a verbal altercation and not as the shooter. Detective Otto testified that defendant replied "no" when the detective asked him "if he saw the offender shoot him." Detective Otto also testified that he first learned that James had seen defendant in the alley on July 15, 2009, after James spoke with Detective Sullivan. Detective Otto prepared a written report on that date, stating that James identified defendant as the person who verbally and physically assaulted him. The report also stated that James identified defendant as the person who pointed a handgun at him before he was shot. Detective Otto acknowledged that, July 15, 2009, was the first time during the course of the investigation that he learned that James saw defendant with a gun. Detective Otto stated that, after he spoke to James in the hospital, it was his understanding that James fled and did not see who shot him.

¶ 20 Neal Scott, a paramedic with the Chicago Fire Department, testified that he treated James at the scene of the shooting. Scott stated that James had pain in his lower back and numbness in one of his legs, but was "alert and oriented times three." Scott testified that was the highest level of alertness and that James was able to communicate with him the entire time during the treatment and transport to the hospital.

¶ 21 Prior to closing argument, the court instructed the jury that closing arguments are not evidence and that they are "merely the attorneys' view of what the evidence and the law established during the course of the trial." The court admonished the jury to disregard what the attorneys say if they "misspeak" or "tell you about the evidence from the stand that doesn't go along with your recollection of the evidence[.]"



¶ 22 During closing argument, the State argued that it had proved defendant guilty of attempt first degree murder and aggravated battery beyond a reasonable doubt. In doing so, the State recounted the evidence presented and that James positively identified defendant as the shooter. Defense counsel argued that the State failed to prove defendant guilty beyond a reasonable doubt because James did not see who shot him. In doing so, defense counsel argued that James was not a reliable witness because it was not until July 15, 2009, that he positively identified defendant as the shooter from a lineup. In rebuttal, the State argued that James was a reliable witness as evidenced by the fact that police issued an investigative alert for defendant immediately after speaking with James.

¶ 23 Following deliberations, the jury found defendant guilty of attempted first degree murder and aggravated battery with a firearm.

¶ 24 Prior to sentencing, defense counsel informed the court that defendant was seeking a new attorney and alleging ineffective assistance of trial counsel. The court admonished defendant that he needed to file a motion with the court raising specific claims of ineffective assistance. On September 10, 2013, defendant filed a *pro se* letter with the court in which he outlined his claims.

¶ 25 On January 14, 2014, the court held a hearing pursuant to *People v. Krankel*, 102 Ill. 2d 181 (1984). The court reviewed defendant's allegations of ineffective assistance of trial counsel and heard his *pro se* argument in support thereof. The court then allowed the State to respond to defendant's argument. Following the State's response, defendant argued in rebuttal. After the hearing, the court denied defendant's motion to appoint new counsel and the case proceeded to sentencing.

¶ 26 At sentencing, the trial court merged the aggravated battery with a firearm count into the attempted murder count. The court sentenced defendant, based on his criminal history, as a Class X offender to an aggregate term of 50 years' imprisonment for attempted first degree murder. Defendant's sentence included a 20-year enhancement because defendant personally discharged a firearm. The court granted defendant 992 days of sentencing credit.

¶ 27 On appeal, defendant first contends that the State failed to prove him guilty of the charged offenses beyond a reasonable doubt because James's identification testimony was unreliable.

¶ 28 When a defendant challenges the sufficiency of the evidence to sustain a conviction, the standard of review is whether after viewing the evidence in the light most favorable to the State, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *People v. Austin M.*, 2012 IL 111194, ¶ 107. Under this standard, a reviewing court does not retry the defendant or substitute its judgment for that of the trier of fact with regard to the credibility of witnesses, the weight to be given to their testimony, and the reasonable inferences to be drawn from the evidence. *Id.*; *People v. Sutherland*, 223 Ill. 2d 187, 242 (2006). A criminal conviction will be reversed only if the evidence is so improbable or unsatisfactory that there exists a reasonable doubt of the defendant's guilt. *People v. Sigenza-Brito*, 235 Ill. 2d 213, 225 (2009).

¶ 29 Defendant's argument that James's identification of the shooter was unreliable rests on the premise that the shooting was independent of the argument regarding the boot, the shooter was an unknown individual, and James did not have sufficient opportunity to observe this individual to positively identify him. In support of this argument, defendant maintains that, had he been the shooter, James would have identified him sooner than 10 months after the shooting.

¶ 30 After examining the evidence, we conclude that a rational trier of fact could have found beyond a reasonable doubt that defendant shot James. Although there was no direct physical evidence presented against defendant, there was James's eyewitness identification of defendant as the shooter. Contrary to defendant's argument, we cannot say that James's identification was so improbable or unsatisfactory that a reasonable doubt as to defendant's guilt exists.

¶ 31 "It is well established that a single witness's identification is sufficient to sustain a conviction if the witness viewed the accused under circumstances permitting a positive identification." *People v. Starks*, 2014 IL App (1st) 121169, ¶ 48. When assessing identification testimony, this court relies on the factors set out by the United States Supreme Court in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972). *Id.* Those factors are: (1) the opportunity the witness had to view the offender at the time of the offense; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the offender; (4) the level of certainty demonstrated by the witness at the identification confrontation; and (5) the length of time between the crime and the identification confrontation. *Id.* (citing *Biggers*, 409 U.S. at 199-200).

¶ 32 In considering the *Biggers* factors in relation to James's identification, we conclude that they weigh in the State's favor. In doing so, we decline defendant's invitation to treat his argument with James and the shooting as two separate unrelated events.

¶ 33 The record shows that James had ample opportunity to observe defendant. Before defendant shot James, defendant spoke to him and attempted to persuade him to remove the boot. When his attempts were unsuccessful, defendant argued with him. During their argument, defendant threatened James, attempted to punch him, and twice approached him with a tree branch. James exhibited a high degree of attention during their altercation. James testified that, after their argument, he continued to watch defendant from the corner of 84th Street. James

accurately described defendant's clothing as well as his actions. James saw defendant run into a gangway and reemerge from an alley 40 or 50 feet away. James stated there was nothing blocking his view of defendant, who was wearing the same clothes he wore during their argument. James saw defendant with his hand extended towards him and heard a "pop." Immediately after the shooting, James described defendant to the first responding officer. Although James did not identify defendant as the shooter from a lineup until 10 months after the shooting, he demonstrated a high level of certainty regarding his identification of defendant as the shooter. James testified that, on the date of the shooting, he identified defendant from a photo array as the person who shot him. James also identified defendant in open court as the person who shot him. James testified that he knew who shot him because he got a good look at him. As such, James's identification was sufficient to sustain the conviction.

¶ 34 Defendant nevertheless argues that James's identification is unreliable because: (1) he did not tell police on the day of the shooting that defendant was the shooter, that he placed a boot on defendant's car before the shooting, or identify where defendant lived; (2) James told police he did not see defendant shoot him; and (3) Detective Otto's testimony impeached James's identification. Defendant maintains that these repeated inconsistencies and contradictions in James's testimony and statements to police, combined with his failure to reveal facts, which would have been natural for him to assert, undermine his credibility.

¶ 35 However, these alleged inconsistencies were fully explored at trial during cross-examination. Although James's credibility may have been affected by Detective Otto's testimony, it was the responsibility of the trier of fact, in this case the jury, to determine James's credibility, the weight to be given to his testimony and to resolve any inconsistencies and conflicts in the evidence. *Starks*, 2014 IL App (1st) 121169 ¶ 51; *Sutherland*, 223 Ill. 2d at 242. Based on their

verdict, the jury resolved these inconsistencies in favor of the State. In doing so, the jury is not required to disregard the inferences that flow from the evidence or search out all possible explanations consistent with a defendant's innocence and raise them to a level of reasonable doubt. *People v. Alvarez*, 2012 IL App (1st) 092119, ¶ 51. We will not substitute our judgment for that of the trier of fact on these matters. *Sutherland*, 223 Ill. 2d at 242. As mentioned, this court will reverse a defendant's conviction only when the evidence is so improbable or unsatisfactory that it creates a reasonable doubt as to the defendant's guilt. *Siguenza-Brito*, 235 Ill. 2d at 225. This is not one of those cases.

¶ 36 In reaching this conclusion, we find factually distinguishable the cases cited by defendant in support of his argument that we should reverse his conviction because James's identification testimony was not reliable. In *People v. Charleston*, 47 Ill. 2d 19, 21-2 (1970), the defendant's conviction for armed robbery and attempted rape were reversed where the complaining witness's behavior in concealing the identity of her assailant was "highly unusual" and her testimony was impeached by multiple witnesses. Here, unlike *Charleston*, James did not attempt to conceal the identity of his shooter in a "highly unusual" manner nor was his testimony impeached by multiple witnesses, rendering his identification testimony unreliable.

¶ 37 In *People v. Hughes*, 17 Ill. App. 3d 404, 409-11 (1974), the defendant's convictions for voluntary manslaughter and murder were reversed where the identification testimony of two alleged eyewitnesses was unreliable. One of the witnesses was impeached by other witnesses who testified that she was not at the scene of the offense. *Id.* at 410. She also contradicted her prior version of events and, despite evidence that she knew the defendant, she needed two opportunities to identify him from a lineup. *Id.* at 409-10. The other witness contradicted himself when he testified that he saw the defendant's face and later admitted that he identified the

defendant by his clothes. *Id.* at 410. This witness also admitted that he viewed the defendant under poor lighting and was uncertain of his identification of the defendant from a lineup. *Id.* at 410-11. Here, unlike *Hughes*, James argued with defendant prior to the shooting; had an unobstructed view of defendant; accurately described his clothing; and positively identified him in open court and from a photo array and lineup as the shooter.

¶ 38 In *People v. Roe*, 63 Ill. App. 2d 452, 454-56 (1965) the defendant's convictions for armed robbery and aggravated assault were reversed where: (1) the complaining witness, despite knowing the defendant's name, did not provide it to police, but instead gave them another name; and (2) another potential key witness was not called to testify. Here, unlike *Roe*, James was not familiar with defendant prior to their argument and there is no evidence that the State failed to present a key witness which would give rise to a reasonable doubt of defendant's guilt.

¶ 39 Defendant next contends that, in an effort to bolster James's identification testimony, the State engaged in prosecutorial misconduct throughout its closing argument and, as a result, denied him his right to a fair trial. Defendant acknowledges that he has forfeited review of this issue because he failed to object to the State's comments and raise them in a written posttrial motion (*People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), but argues that we should review the issue for plain error.

¶ 40 The plain error rule is a narrow and limited exception to the general rule of forfeiture. *People v. Naylor*, 229 Ill. 2d 584, 593 (2008). Under the plain error doctrine, a reviewing court will review an unpreserved error when a clear and obvious error occurs and: (1) the evidence is closely balanced; or (2) the alleged error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Bannister*, 232 Ill.

2d 52, 65 (2008). The first step in the plain error analysis is determining whether an error occurred. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Here, we find that no error occurred.

¶ 41 A prosecutor has wide latitude regarding the content of closing and rebuttal arguments, and may comment on evidence and any fair and reasonable inferences the evidence may yield. *People v. Runge*, 234 Ill. 2d 68, 142 (2009). "The purpose of closing arguments is to give the parties a final opportunity to review with the jury the admitted evidence, discuss what it means, apply the applicable law to that evidence, and argue why the evidence and law compel a favorable verdict." *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005) (quoting T. Mauet & W. Wolfson, *Trial Evidence* 439 (2d ed. 2001)). When reviewing a claim of prosecutorial misconduct during closing argument, we consider the entire closing argument of both parties to place the comments in context. *People v. Maldonado*, 402 Ill. App. 3d 411, 422 (2010). Comments constitute reversible error only when they engender substantial prejudice against the defendant such that it is impossible to say whether or not a verdict of guilt resulted from those remarks. *People v. Nieves*, 193 Ill. 2d 513, 533 (2000).

¶ 42 Both parties point out that due to a conflict between two supreme court cases, it is unclear whether we review this issue *de novo* or for an abuse of discretion. See *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007); *People v. Blue*, 189 Ill. 2d 99, 128 (2000). In doing so, defendant argues that we should apply the *de novo* standard, while the State urges us to review this issue for an abuse of discretion. However, we need not determine which is the proper standard of review because the result here is the same under either standard. See *People v. Woods*, 2011 IL App (1st) 091959, ¶ 38; *People v. Raymond*, 404 Ill. App. 3d 1028, 1060 (2010).

¶ 43 Defendant first challenges comments made by the State regarding James's identification of defendant from the photo array and lineup. The State argued in closing:

" \*\*\* The detective's testimony and \*\*\* James' testimony about first the photo array, then the physical lineup demonstrate that there was no hesitation, there was no partial identification. He immediately picked out this person as the person who did it to him, as the shooter; first in the photo array then the physical lineup."

Defendant argues that the State, with this remark, misstated the evidence and misled the jury by suggesting that Detective Otto corroborated James's testimony regarding his identification of defendant as the shooter. We disagree.

¶ 44 The State's argument was supported by the evidence presented where James testified that he identified defendant as the shooter from the photo array and lineup. As such, the prosecutor was free to comment on it. *Runge*, 234 Ill. 2d at 142. Accordingly, we find no error.

¶ 45 Defendant next challenges remarks made by the State regarding James's description of defendant. The State argued in closing:

"The witnesses' earlier description of the offender. He never varied here, white T-shirt, blue jeans. There wasn't even any evidence that the description of the offender changed, of this defendant."

Defendant argues that, with this remark, the State misstated the evidence and shifted the burden of proof to the defense. Again, we disagree.

¶ 46 As before, this comment was supported by the evidence presented and the prosecutor was free to make it. Nothing in this remark shifted the burden to defendant. Instead, the State was arguing that James was a credible witness where he was able to positively describe defendant and consistently identified defendant's clothing. As such, there was no error with this remark.

¶ 47 Defendant further challenges remarks made by the State regarding the issuance of the investigative alert. The State argued in rebuttal:



"Why did that investigative alert go out the night that the detectives talked to \*\*\* James? Why did it go out? It went out because they had evidence against [defendant]. They had evidence that he was the man that did this. They had circumstantial evidence and you know what, if \*\*\* James is so adamant to Detective Otto that I don't know who shot me, that investigative alert wouldn't have gone out. He told you the investigative alert went out for the aggravated battery, not for wielding a stick at \*\*\* James."

Defendant argues that this remark was prejudicial because it was not supported by the evidence and "invited the jury to speculate about what other evidence the police had implicating" defendant. Again, we disagree.

¶ 48 The record shows that the State's remark was made in direct response to comments made by defendant who argued extensively during closing argument that James did not see who shot him. During his closing argument defendant stated:

\*\*\*\* And we are arguing to you and arguing to you by way of inference that had [James] known, had he really seen the shooter, he would have told somebody who the shooter was. And we know who he could have told. He could have told Detective Otto[.] \*\*\*.

\*\*\* Did he say, did he say it was [defendant]? Did he say it was the guy that I just put the boot on? No. No. No. No. Because the truth is he didn't see the shooter.

By way of inference, \*\*\* the entire purpose of Detective Otto going to talk to him at the hospital was for the purpose of identification. \*\*\*.

\*\*\* It's a whodunit case. \*\*\* That's why he went there with a photo lineup."

¶ 49 As with other aspects of closing arguments, rebuttal must be considered in context, including defendant's closing argument. *People v. Kliner*, 185 Ill. 2d 81, 154 (1998). During

rebuttal, prosecutors are entitled to respond to comments made by defendant in closing "which clearly invite a response." *Kliner*, 185 Ill. 2d at 154. The State's remark was made in response to defendant's closing argument and was therefore not in error. That said, the State's remark was also supported by the evidence where Detective Otto testified that, after speaking with James in the hospital, he issued an investigative alert that there was probable cause to arrest defendant for aggravated battery. Accordingly, we again find no error with the State's remarks.

¶ 50 Defendant also argues, without citation to authority, that the State misused course of investigation evidence to attack his character. The State argued in rebuttal:

\*\*\* And the stick doesn't matter, the stick doesn't matter. That just shows you the [kind] of person he is. That's what that shows you.

And you know what else, you know how else you know the kind of person is that this defendant is, Detective Otto told you about the lineup, after he was identified in the lineup, he wouldn't stand for a picture.

[DEFENDANT]: Objection.

THE COURT: Overruled.

[THE STATE]: They had to pick him up off the ground and they had to hold him. They had to pick him up off the ground and they had to hold him for a picture after he was identified in the lineup. He has a temper, Ladies and Gentlemen."

Defendant argues that the State's remarks served only to prejudice him to the jury because his conduct after the lineup was in no way relevant to whether he committed the charged offenses.

¶ 51 Again, after considering the State's rebuttal in context of defendant's closing argument, we cannot say that it was in error where it was invited by defendant. *Id.* During his closing argument, defendant argued:

"What about this dispute? How about the stick? How about the stick? \*\*\*

We go from waving this stick to murder? Attempted murder? A tree limb, a tree branch? Did he ever hit him with it? No. Did he ever punch him? No, did he ever spit on him? No. It's seven, eight, nine inches long, broken rotting. How big is the other one? Four, five, six inches? Intent or attempted murder. Premeditation. He's going to finish his dirty work by waving this stick. It's almost a juvenile act."

Defendant's argument attempted to downplay his confrontation with James and portray his actions as "juvenile." As such, the State was entitled to respond to this argument and we find no error with the State's response. This is particularly so where the State's remark was again supported by the evidence presented. The record shows that Detective Otto testified to defendant's behavior after the lineup and therefore the State was free to comment on this evidence. *Runge*, 234 Ill. 2d at 142.

¶ 52 Finally, defendant challenges the State's remarks regarding the length of time between James's identification of defendant from the lineup and defendant's arrest. In rebuttal, the State argued:

"And if they want you to believe that \*\*\* James is such a liar, \*\*\* James would have got up there and he would [tell] you, I guess they wanted you to believe like a fifth or sixth version of the story. He would have got up there and told you, yeah, I saw him with a .45 caliber and he cocked it and I saw him point it and say I'm going to kill you. He didn't say any of that. He told you what he saw. He didn't make it any better, he just told you what happened.

And that's all he's asking is to tell his story, to tell you what happened that day. Don't punish \*\*\* James because he had a two-year vacation while an arrest warrant was

out for him. That has nothing to do with it. That has nothing to do with \*\*\* James, it has nothing to do with his testimony from the stand. Don't punish him and don't reward the defendant.

\* \* \*

Ladies and Gentlemen, yeah, it took a couple years for this defendant to get arrested, so what. So he had a couple years, an extra two years on the run. His vacation is over, Ladies and Gentlemen."

Defendant argues that these remarks were in error because their sole purpose was to inflame the passions of the jury and encourage the jury to return a guilty verdict based on their emotions and not the evidence presented at trial.

¶ 53 The general rule is that a prosecutor cannot use closing argument simply to "inflame the passions or develop the prejudices of the jury without throwing any light upon the issues." *People v. Wheeler*, 226 Ill. 2d 92, 128-29 (2007) (quoting *People v. Halteman*, 10 Ill. 2d 74, 84 (1956)). Moreover, we consider the closing argument as a whole, rather than focusing on selected phrases or remarks, and we will find that comments constitute reversible error only when they engender substantial prejudice against the defendant such that it is impossible to say whether or not a verdict of guilt resulted from those remarks. *Runge*, 234 Ill. 2d at 142. The complained-of remarks in this case fall far short of this standard and do not amount to error, let alone reversible error.

¶ 54 The comments were brief and isolated, in the context of a longer rebuttal argument. We find this factor significant in assessing the impact of these remarks on a jury verdict. *Runge*, 234 Ill. 2d at 142; *People v. Harris*, 225 Ill. 2d 1, 33 (2007). In addition, after considering the State's

comments in context to defendant's closing argument, we cannot say that they were in error where they were invited by defendant's closing argument. During his closing argument, defendant argued that James did not know who shot him and changed his story to positively identify defendant as the shooter. The State was free to respond to defendant's argument. *Kliner*, 185 Ill. 2d at 154. Moreover, the State's remarks were supported by the evidence. The record shows that an arrest warrant was issued for defendant in September 2009 and he was not arrested until July 2011. Accordingly, we find no error with the State's remarks.

¶ 55 Defendant next contends, the State concedes, and we agree, that we must remand for a new *Krankel* hearing because the trial court compromised the objective nature of the preliminary *Krankel* inquiry by allowing the State to take an active adversarial role.

¶ 56 In *People v. Jolly*, 2014 IL 117142, ¶¶ 38-41, our supreme court made clear that "the State should never be permitted to take an adversarial role against a *pro se* defendant at [a] preliminary *Krankel* inquiry" and that such participation by the State is not harmless. The court in *Jolly* found that the best remedy in such a case is to remand for a new preliminary *Krankel* inquiry before a different judge and without the State's adversarial participation. *Id.* ¶ 46.

¶ 57 Here, the record shows that the court allowed the State to respond to defendant's *pro se* arguments of ineffective assistance of trial counsel during the preliminary *Krankel* inquiry. Following the State's response, defendant was allowed to argue in rebuttal. The trial court erred in allowing the State to confront and challenge defendant's claims when defendant was not represented by counsel. *Id.* ¶ 40. Accordingly, pursuant to *Jolly*, we remand for a new preliminary *Krankel* inquiry before a different judge and without the State's adversarial participation.

¶ 58 Defendant finally contends, the State concedes, and we agree that his *mittimus* should be corrected to reflect one additional day of sentencing credit. The record shows that defendant was arrested on July 27, 2011, and remained in custody until he was sentenced on April 15, 2014, for a total of 993 days of sentencing credit. Defendant was granted 992 days of credit. Accordingly, pursuant to Rule 615(b)(1), we order the Clerk of the Circuit Court of Cook County to correct defendant's *mittimus* to reflect one additional day of presentencing credit, for a total of 993 days. Ill. S. Ct. R. 615(b)(1) (eff. July 1, 2013).

¶ 59 For the reasons stated, we affirm the judgment of the trial court; remand for a new *Krankel* hearing before a different judge and without the State's adversarial participation; and correct defendant's *mittimus* to reflect a total of 993 days of sentencing credit.

¶ 60 Affirmed and remanded with directions; *mittimus* corrected.