FOURTH DIVISION
October 27, 2016

No. 1-14-2083

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. 08 CR 13613
	)	
TROLUS PICKETT,	)	Honorable
	)	Brian K. Flaherty,
Defendant-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Burke concurred in the judgment.

ORDER

¶ 1 *Held*: Conviction affirmed. Claim that evidence of defendant's posttraumatic stress disorder should have been admitted was unreviewable absent offer of proof regarding proposed expert testimony. Comments in closing argument regarding possible motive for murder were not plain error. Prosecutors' improper impeachment of witness not prejudicial where it was not an extensive pattern of improper cross-examination. Trial court did not abuse discretion in admitting dying declaration of witness. Defendant forfeited claim that juror should not have been allowed to serve based on inability to speak English. Claims of ineffective assistance of counsel not reviewable where they were based on evidence beyond record.

¶ 2 On June 28, 2011, defendant Trolus Pickett shot his girlfriend three times, killing her. The State charged defendant with eight counts of first-degree murder. At his jury trial, defendant claimed that he had mistakenly shot his girlfriend because he thought an intruder was in the house. Defendant testified that he had been a victim of numerous violent attacks in the past,

which led him to be very afraid of home invasions, and explained his heightened degree of anxiety when his girlfriend told him that an intruder was in his home.

¶ 3 The jury found defendant guilty of first-degree murder, and the trial court sentenced him to 45 years' incarceration. He appeals, raising six issues: (1) that the trial court violated his right to present a defense when it excluded expert testimony that defendant suffered from posttraumatic stress disorder (PTSD), which would explain his paranoia about the alleged intruder; (2) that the prosecutors committed misconduct at trial when they made arguments that were not supported by the evidence and they misrepresented the contents of a witness's prior written statement; (3) that the trial court erred in admitting, as a dying declaration, testimony that defendant's girlfriend told the police that defendant shot her and that there was no one else in the house; (4) that he was denied his right to a 12-person jury because one of the jurors did not speak English well; (5) that his attorney was ineffective for failing to introduce certain photographs and eyewitness testimony; and (6) that the cumulative effect of these errors deprived him of a fair trial.

¶ 4 We affirm defendant's conviction. We cannot determine whether the trial court erred in excluding the PTSD evidence because defense counsel made no offer of proof as to their potential testimony, and the record contains no reports from the proposed experts by which we can determine the relevance of their testimony. The prosecution's comments during closing arguments were either reasonable inferences from the evidence or else did not rise to the level of plain error. And the prosecutors' inaccurate impeachment of the defense witness did not prejudice defendant where it was an isolated incident and the prosecutor did not rely on the impeachment in closing arguments. The trial court did not err in admitting the victim's statement as a dying declaration where the circumstantial evidence, especially the severity of the victim's

wounds and her difficulty breathing, indicated that she made her statements in contemplation of her imminent death. Defendant forfeited his claim that he was denied his right to a 12-person jury where he did not seek to strike the juror during *voir dire* and he did not raise plain error on appeal. Nor do we reach defendant's claims of ineffective assistance because they are based on evidence outside the record and are better suited for a postconviction proceeding. And the various alleged errors at trial did not culminate to establish reversible error.

¶ 5 I. BACKGROUND

¶ 6 A. Pretrial Proceedings

¶ 7 Prior to trial, the State moved to "bar any and all testimony from medical personnel suggesting [that] defendant suffer[ed] from a mental defect or disorder." The State noted that defense counsel had hired Dr. Robert Hanlon to perform a psychological evaluation of defendant, and that Hanlon had diagnosed defendant with chronic PTSD, alcohol dependence, and cannabis abuse. The State noted that Hanlon "did not opine that *** defendant was insane at the time of the commission of th[e] offense" and that Dr. Susan Messina, a psychologist with Forensic Clinical Services, found that defendant was sane at the time of the offense and "was not suffering from a prominent mental disease or defect, including [PTSD], which would have precluded him from being able to appreciate the criminality of his behavior at that time."

¶ 8 In his response, defendant noted that both Dr. Hanlon and Dr. Susan Pearlson, who had been hired to test the validity of Dr. Hanlon's PTSD diagnosis, diagnosed defendant with PTSD. Defendant added the Dr. Pearlson found that defendant suffered from PTSD "as a result of repeated traumatic episodes which threatened him with serious bodily harm or death."

¶ 9 Defendant stated that he "never sought a determination of sanity" from Drs. Hanlon and Pearlson and that "the defense does not intend to introduce evidence of the affirmative defense of

insanity." Rather, defendant said, "[t]he proffered testimony of the defense experts goes directly and solely to evidence of [defendant's] state of mind at the time of the occurrence." Defendant explained:

> "[T]he defense does not offer expert testimony on the issue of intent. Testimony is offered to explain [defendant's] knowledge and belief more than intent. It is the position of the defense that [defendant] was under a mistaken belief of fact at the time of his actions, to wit that there was an intruder in his home. He was acting to protect himself, his girlfriend and their home when he opened fire in the home. *** The intent of [defendant] was to kill[ ] an intruder, not the deceased."

¶ 10 At the hearing on the State's motion, defense counsel explained the intended use of the experts' testimony more fully:

> "I will not elicit any information about his mental state. I will not argue anything about his diminished capacity or his desire to get away from the act in which he did. He is going to fully embrace what he did.
>
> It's only to explain his mistake of fact. In essence, when he was younger on numerous occasions, he was [a] victim of home invasions. He was jumped on the streets, and he was beaten on numerous occasions.
>
> Because of that, he is a little more paranoid than the average person, and certainly in his home where he has been violated before. Hence the reason why he carries a gun in his own home legally.
>
> This is to explain the fact that when he was in his home, with his girlfriend, he thought that he was protecting himself, his home, and a girlfriend that he ultimately and

> mistakenly shot. He was not saying at any time that he didn't appreciate the gravity of his actions.
>
> He intended to kill someone, an intruder. The problem is, there was no intruder. His paranoia made him think a mistake of fact, that there was someone else in the house other than the two of them who meant to do them harm."

¶ 11 The trial court granted the State's motion. The court noted that it "had an opportunity to read *** Defendant's Exhibit A, which is a report from Dr. Pearlson." The record on appeal does not contain Dr. Pearlson's report. The court found that the proposed expert testimony would constitute improper testimony on defendant's mental state.

¶ 12 Defendant moved to exclude testimony that Belissa Gourdine, the victim, told three police officers, "No one else was in the house. [Defendant] just started yelling and shooting!" Defendant argued that such testimony would be hearsay that would not be admissible pursuant to the exception for dying declarations. Defense counsel argued that the State could not show that Gourdine made the statement while believing that her death was imminent because she did not say anything to suggest that she believed she was dying, the police only told her that her injuries were serious, and the police did not tell her that she was going to die. The State responded that Gourdine's awareness of her imminent death could be inferred from the fact that she had been shot three times and was lying on the floor, unable to move, at the time she made her statement. The trial court denied defendant's motion, finding the statement to be admissible as a dying declaration.

¶ 13 During *voir dire*, the court questioned prospective juror Jose Quezada about how long he had been with his current employer, and Quezada responded, "Well, I am sorry, but I am not real—poor in my English." The court again asked Quezada how long he had been with his

current employer, and Quezada replied, "Twenty [years]." The court asked Quezada about his family and the principles embodied in Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). Quezada was able to answer the trial court's questions. Defense counsel then questioned Quezada, asking him if he knew any police officers, attorneys, or judges. Defense counsel did not ask Quezada about his English. Defense counsel did not seek to excuse Quezada for cause or use a peremptory challenge to strike Quezada. Quezada was selected for the jury.

¶ 14 B. Trial

¶ 15 Officer John Sweitzer of the Park Forest police department testified that, around 6:54 p.m. on June 18, 2008, he received a call indicating that shots had been fired at a single-family home located at 329 Nokomis Street. Sweitzer arrived at the address within a few minutes, parked, and approached the house on foot. Sweitzer stood behind a tree across the street from the house, and two other police officers arrived on the scene.

¶ 16 Sweitzer testified that, as he stood across the street from the house, he heard a "loud" male voice and the sound of breaking glass. He could not hear what the man was saying. Sweitzer said that he saw something break one of the windows on the front of the house and land out on the lawn. He did not know what had broken the window.

¶ 17 Sweitzer testified that he began to order anyone inside the house to come out and surrender. After two minutes of Sweitzer ordering the person inside the house to come out, defendant came out of the front door with his hands up. Sweitzer testified that defendant was "very agitated," "out of breath," and "very excited." Sweitzer noticed that defendant had blood on his hands, his shirt, and his pants. Sweitzer and the two other officers handcuffed defendant. Defendant did not resist the officers.

¶ 18 Sweitzer testified that, after defendant was handcuffed, Corporal Donegan arrived on the scene. Sweitzer and Donegan went to the front door of the house and heard "a female voice calling from inside." Sweitzer and Donegan entered, and Sweitzer saw "debris strewn about the floor, broken glass, broken pieces of furniture," and "a black semiautomatic handgun on the floor of th[e] front room." Sweitzer testified that he followed the sound of the woman's voice down the hallway to a closed bedroom door.

¶ 19 Sweitzer entered the bedroom and saw Gourdine on the floor with two large pit bull dogs lying on top of her. As Sweitzer approached Gourdine, the dogs bared their teeth and growled, causing Sweitzer to retreat back into the hall. Sweitzer called the other officers outside the house to control the dogs.

¶ 20 Commander Michael Baugh was outside the bedroom with two other officers when he received Officer Sweitzer's call. Baugh and the two other officers tore the screen from the outside of the bedroom window and "ripped the blinds from the window to *** see inside." Baugh testified that the two officers used their tasers to incapacitate the two dogs.

¶ 21 Officer Sweitzer testified that, once the dogs had been tasered, he and Commander Baugh pulled them off of Gourdine. Sweitzer said that Gourdine was lying face-down on the floor in a pool of blood saying, "I need help. I can't breathe." Sweitzer described Gourdine's breathing as "very shallow" and "very labored." Sweitzer rolled Gourdine over and saw large, bloody wounds on her chest and stomach.

¶ 22 Sweitzer testified that Corporal Donegan was also in the room when Sweitzer rolled Gourdine over. Sweitzer testified, over defense counsel's objection, that Donegan told Gourdine "that her wounds appeared to be very serious and she may not survive." Sweitzer testified that he and Donegan asked her what happened, and Gourdine replied, "My boyfriend Trolus, Trolus

Pickett shot me." They asked her if anyone else was in the house, and she replied, "No one else was in the house, Trolus just started yelling and shooting."

¶ 23 Commander Baugh testified that he was also present for the conversation with Gourdine. Baugh testified that Corporal Donegan told Gourdine "that she was injured pretty severely" before the officers asked her what happened. Baugh testified that Gourdine replied, "My boyfriend Trolus Pickett had shot me." Baugh also testified that they asked her if anyone else was in the house, and she replied, "No, only Trolus was inside of there, and he started yelling and shooting." On cross-examination, Baugh testified that Gourdine did not say that defendant was angry, that he shot her on purpose, or that they had had a fight before he shot her.

¶ 24 Sweitzer and Baugh testified that, after they spoke to Gourdine, paramedics arrived and took her to the hospital. Gourdine had three bullet wounds on her body: one to the left side of her chest, one to the right side of her abdomen, and one to the right side of her lower back. There was evidence of close-range firing on the wounds to her abdomen and back, with the wound on her abdomen having more pronounced evidence of close-range firing. Gourdine died as a result of the gunshot wounds.

¶ 25 After Gourdine had been taken to the hospital, Commander Baugh stayed inside the house in order to preserve and collect evidence, as well as photograph the scene. Baugh testified that he saw that two small panes of glass on the front door had been broken. The living room window—the window that Sweitzer testified that he had seen an object fly through—was also broken, and a large metal object was lying on the front lawn just outside of it.

¶ 26 Baugh testified that, as he entered the house, "there was a little broken glass and some blinds, vertical blinds that were knocked down" immediately to his right. He also saw a tall broken lamp lying near the blinds and a black handgun in the middle of the living room floor.

¶ 27 Baugh returned to the bedroom where Gourdine had been found. He saw a large pool of blood on the floor, a cartridge casing on the bed, a cartridge casing behind the door, a case for a .45-caliber gun on the left side of the bed, and a .40-caliber handgun on the right side of the bed.

¶ 28 In the kitchen, Baugh saw a bullet hole in the window that went north toward a neighboring house. Baugh also saw two bullet holes in a door in the kitchen that led to an adjacent utility room. In the entryway of the utility room, Baugh found six more cartridge casings, one fired bullet, and four bullet holes in the wall leading out of the house.

¶ 29 Baugh collected all of the cartridge casings he had found throughout the house. Forensic testing showed that the cartridge cases recovered from the scene were all fired from the .45-caliber handgun that Baugh had found.

¶ 30 Baugh testified that he saw defendant again at the Park Forest police department, after defendant had been treated at the hospital. Defendant had cuts and a bandage on his right hand.

¶ 31 Defendant testified to numerous incidents in his past where he had been attacked or threatened with violence. In 1991, defendant left a club in Chicago around 4 a.m. and took a shortcut through an alley to get home. A man jumped out from behind a tree and pointed a revolver at him. The man said, "[I]s that him," and shot defendant in the stomach. Defendant ran away, and the man shot him in the back. Defendant made it back to the club, where a friend took him to the hospital.

¶ 32 In 1994, defendant accompanied a friend to a house with a couple that he did not know well. His friend left, leaving defendant alone with the couple. While defendant was there, a group of men tried to break into the house. Defendant held the door shut, but one of the men managed to put the barrel of a revolver between the door and the frame. Defendant pushed the gun out of the way and shut the door. He managed to escape unharmed.

¶ 33 In 1996, defendant was living with his parents. As he was pulling out of their garage in his new car, eight or nine men approached him and told him to check on his friend Eric. Defendant drove to Eric's house and, as he approached the front door, three or four men began to beat him. One of them hit him in the head with a gun. They stopped beating defendant when Eric's grandmother opened the door and told them to stop.

¶ 34 In 1998, defendant was visiting a friend in New Mexico. After getting out of the shower, he saw two men in the house, one of whom was armed. The armed man pointed the gun at defendant's face and asked defendant where the money was. Defendant said that he did not know, and the man hit him in the head with the gun and punched defendant in the face. Defendant tried to flee by jumping out of the window, but he did not break the glass, and the armed man fired at him. Defendant kicked out the glass of the window and escaped, but he cut himself in the process. He described his injury as leaving "a piece of meat hanging from [his] arm by some veins."

¶ 35 In 2005, defendant was at a gas station, when a man wearing a ski mask and carrying a gun jumped into his car. Defendant jumped out of the car and escaped.

¶ 36 Finally, in January 2008, a man pointed a gun at defendant as he left a liquor store. The man said, "[Y]ou're lucky you're the wrong one," and ran away when the liquor store owner came out.

¶ 37 After the 2008 incident, defendant bought the .45-caliber handgun that Commander Baugh had found in the house. He testified that, because of these events, he did not feel comfortable being alone in a house. Defendant denied feeling anger or rage about the incidents of violence in his past.

¶ 38 Defendant testified that he started dating Gourdine in 2005. Shortly thereafter, he moved in with her and her three children at 329 Nokomis. Defendant testified that he paid the mortgage on the house while Gourdine took care of the children. He described their relationship as "excellent, wonderful."

¶ 39 Defendant testified that, around the time of the shooting, he was working as a truck driver. He had recently gotten a local job that would not require him to travel as much. On June 18, 2008, he and Gourdine were celebrating defendant's new job by barbecuing. Defendant testified that he and Gourdine had no arguments that day and were not involved in an ongoing disagreement. At that point, their relationship was loving and happy.

¶ 40 Defendant testified that he was in the backyard grilling with his two dogs and his gun. He testified that he carried his gun with him whenever he was walking around his house.

¶ 41 Defendant testified that Gourdine came to the screen door leading to the backyard and told him that she thought someone was in the house. Defendant said that he felt "terrified," so he loaded his gun and went inside the house. It was a sunny day, but the curtains of the house were closed. He walked through the utility room, kitchen, living room, and children's room, but did not see anyone.

¶ 42 As defendant walked through the house, he feared that someone was "going to jump out and ambush us." He said that he was very afraid. As defendant approached his bedroom, he told Gourdine to wait in the hallway.

¶ 43 Defendant walked into his bedroom about six feet when he felt someone grab his right shoulder. He closed his eyes, turned, and started firing his gun. As he was firing, he opened his eyes and saw that he had shot Gourdine. He testified that he did not intend to shoot her.

¶ 44 After realizing that he had shot Gourdine, defendant continued to shoot and scream, "[H]elp us." He testified that he kept shooting because he still thought someone was in the house. Eventually, he ran out of bullets and he used the barrel of the gun to break out the front window of the house. Defendant said he broke the window because he saw his neighbors across the street and he wanted to call to them for help. Defendant testified that he cut his hand when he broke the window, although he did not feel it at the time. Defendant said he broke a few more windows with a lamp so that he could be sure the neighbors would hear him screaming.

¶ 45 Defendant testified that he ran back to where Gourdine was lying and told her "to hold on [be]cause the police and ambulance [were] coming." He looked out of the house and saw that the police had arrived. He shut Gourdine into the bedroom with the two dogs to keep her safe and walked out of the front door. The police handcuffed him.

¶ 46 On cross-examination, defendant acknowledged that he and Gourdine each had cell phones, and that there was a house phone in his bedroom. Defendant testified that, when he thought the intruder was in the house, he and Gourdine's cell phones were also in the bedroom.

¶ 47 He also denied that he and Gourdine had financial problems or arguments about money. Defendant testified that he had been working as a truck driver making $89,000 per year. Defendant testified that he and Gourdine were not having sex at the time, but he attributed that to the fact that his father was a pastor and to his own religious convictions.

¶ 48 Defendant also called two of his neighbors, Rodolfo Roman and Marcus Thigpen, to testify on his behalf. Roman testified that he lived next-door to Gourdine and defendant. Roman described his relationship with defendant as "[p]olite" and "friendly," but said that he had never had a conversation with defendant "for any long period of time."

¶ 49 Roman testified that he was at home all day on June 18, 2008, working in his backyard. He saw defendant in the backyard of 329 Nokomis, grilling. Throughout the day, he saw Gourdine going in and out of the house, bringing defendant items to grill. He did not hear defendant and Gourdine argue or raise their voices toward one another.

¶ 50 Later that evening, Roman was in the backyard with his wife when he heard gunshots and the sound of breaking glass coming from Gourdine's house. He did not hear yelling or raised voices just prior to the gunshots.

¶ 51 Roman testified that he ran to the house across the street and stood in the driveway with his neighbors who lived there. From there, Roman heard defendant yell for help. About two to three minutes later, the police arrived. He testified that the police went into the house and brought defendant outside.

¶ 52 On cross-examination, Roman testified that he did not remember whether he told the police that he had heard defendant yelling for help. The State presented Roman with a copy of the signed statement he had given to the Park Forest police the day after the shooting, and asked the following questions:

> "Q. *** But, as you look through your statement today no where [*sic*] in that statement that you gave the day after the shooting did you ever say that you heard [defendant] yelling for help? Is that right?
>
> A. Correct.
>
> Q. It is no where [*sic*] in your statement?
>
> A. I guess not."

Roman's statement, which is included in the record on appeal, states, "I remember the officers bringing [defendant] out of the front door of his house. Before they got [defendant] out of the

house, he was screaming something like, 'Help me!' " During redirect examination, defense counsel did not draw Roman's attention to that portion of his statement. During the State's rebuttal case, it re-called Commander Baugh, who testified that Roman never told him that he heard defendant yell for help.

¶ 53 Thigpen lived across the street and three houses south of 329 Nokomis. He testified that his children played with Gourdine's children regularly. He saw defendant and Gourdine "on a pretty frequent basis," and was "becoming closer friends" with defendant at the time of the shooting. At that time, Thigpen saw defendant three to four times per week.

¶ 54 Thigpen visited defendant in his backyard on June 18, 2008. Defendant had the grill on and did not appear to be upset. He did not hear defendant and Gourdine argue. Thigpen and defendant shared a beer and talked about defendant's difficulties in finding work. Thigpen testified that defendant had been looking for work for about two or three months. Defendant told Thigpen that he had a job as a truck driver lined up, but it had fallen through. After finishing his beer, Thigpen left to take a shower at his house. About 20 to 30 minutes after Thigpen got home, he got a call and went outside. He saw police surrounding defendant outside of defendant's house.

¶ 55 In her opening closing argument, the prosecutor argued that defendant and Gourdine had money problems, and that the shooting was spurred by an argument between defendant and Gourdine:

> "But, see, things are not as they seemed, and [Gourdine's] happy life was also not as it seemed. Because their relationship was not perfect. They had money issues, financial stuff. The Defendant had been out of work for a couple of months. They weren't having sex. Things were not going the way everybody thought they were.

> And, see, what happened as [Gourdine] was in her room watching TV, is that they began to argue. And this was not an argument that used words only because that argument led the Defendant into a rage; a rage where he pulled out his trusty .45-caliber gun; a rage where as she stood in her very own bedroom, the Defendant took that gun, and he fired it close to her; and he fired once in the chest, once in the abdomen, once at her back as she's turning away."

Defense counsel did not object to these comments.

¶ 56 Later in her opening closing argument, the prosecutor said, "This is the scene of a rageful domestic dispute that turned deadly." Defense counsel objected to that statement, but the trial court overruled the objection.

¶ 57 In his closing argument, defense counsel argued that the shooting was an accident. Defense counsel also noted the State's lack of any evidence of motive:

> "Motive: Now, the State will tell you, I'm sure, that they don't have to prove motive. But ironically enough, they have undertaken that chore *** a few times over. ***[A]s the opportunity arose during trial, did you notice how they threw in some possible motives? No support for them—
>
> MS. CROTHERS [Assistant State's Attorney]: Objection.
>
> MR. CARR [defense counsel]: —but they threw it out there.
>
> THE COURT: Overruled.
>
> MR. CARR: Motive number one, 'He's enraged.' By what? By what? *** What was it?
>
> * * *

Another possible scenario that they threw out there, money, the root of all evil. 'They had financial problems.' Who doesn't have financial troubles? *** It doesn't elevate them to the level of murder.

And, in fact, if you listen to what the testimony was from the stand of Mr. Thigpen regarding what the financial problems were, the testimony was that [defendant] had been unemployed for a period of time, but now he was starting a new job. So whatever financial problems *** they may or may not have had, if you believe that version of it, they were about to change for the better.

* * *

Lastly, sex: 'Sex was the reason why he lost it that day. He wasn't getting any.' *** [H]e told you, his mom and dad are pastors. Okay. He's already living in sin because he's not married, but to also be having sex actively was a burden to him more."

¶ 58 In her rebuttal closing argument, the prosecutor discussed defendant's possible motive at length:

"[Y]ou see couples that on the outside seem like everything is okay. They don't seem to be having much trouble. But at the end of the day, you're walking by their house, the doors are closed, and you hear the screaming, you hear yelling, and you are getting a little glimpse into what happens behind those closed doors. But the outward appearance different than what *** people like the Defendant, the kind of situation they create inside their home, their home where someone like [Gourdine] is utterly and completely defenseless against the rage that is building and had been building in this man.

* * *

> And then his friend testifies on his behalf and tells you, 'Well, we've talked many times about the fact that he's very upset about how he isn't working, hasn't been working, hasn't been working for months. He has not been paying any of the bills. He is upset about that.' "

Defense counsel objected to that statement as mischaracterizing Thigpen's testimony. The court instructed the jury that the lawyers' arguments were not evidence, and that the jurors should rely on their recollection of the evidence.

¶ 59 Later, the prosecutor resumed her argument that the shooting resulted from a dispute between defendant and Gourdine:

> "You are talking about a household where the man, that's the man of the house, that he describes him [*sic*] as, that he's so proud that he pays all the bills hasn't worked in months. Money is tight and the situation has gotten so bad that they are not having sexual intercourse anymore for a long time. And he's saying to you that that wouldn't be a reason why someone would have a rage, and an anger and be the source of a domestic that would happen? It is no small irony that he gunned her down in the very bedroom where they were no longer having sex."

Defense counsel did not object to this argument.

¶ 60 The prosecutor also argued that defendant was lying about his story in 1998 when he jumped out the window, pointing out to the jury photographs of defendant's arm that did not show extensive scarring. The prosecutor further argued that defendant tore down the blinds at the front window, prompting an objection from defense counsel, which was overruled.

¶ 61 The jury found defendant guilty of first-degree murder.

¶ 62 C. Posttrial Proceedings

¶ 63 Trial counsel filed a motion for new trial on defendant's behalf, but defendant also filed a *pro se* motion indicating that trial counsel was ineffective. With new counsel, defendant filed an amended motion for new trial. The amended motion for new trial alleged that the trial court erred in barring the expert opinions on defendant's PTSD, the court erred in admitting Gourdine's alleged dying declarations, and the prosecution made improper comments during closing arguments.

¶ 64 Defendant also argued that his trial counsel was ineffective for several reasons. First, he argued that trial counsel was ineffective for failing to introduce photographs of his inner arm, which would have corroborated his testimony that he cut his arm when jumping out of the window during the 1998 home invasion. Second, defendant alleged that counsel was ineffective for failing to challenge prospective juror Quezada during *voir dire* because of his inability to speak English well, and that Quezada appeared "preoccupied," "disinterested," and "confused" throughout the trial. Third, defendant alleged that counsel was ineffective for failing to call "a witness, who at the time of the alleged offense, had been across the street from the residence in question, and had viewed and/or heard at least some of the events in question."

¶ 65 The trial court denied the motion for new trial. With regard to counsel's failure to strike Quezada, the trial court made specific findings:

> "I think it's self-serving that you put down here that Mr. Que[z]ada was preoccupied and disinterested while witnesses gave testimony consisting for long duration and appeared confused and uninterested in the proceedings. One of the things that I do during a jury trial is, I make sure everyone is awake, and I spend a lot of time taking notes, looking at the jury to make sure that the jurors are paying attention. And again, there was never any indication that Mr. Que[z]ada was not paying attention.

Again, that's trial strategy, who we are going to keep on as jurors, and [trial counsel] did it."

¶ 66 The trial court sentenced defendant to 45 years' incarceration. Defendant filed this appeal.

¶ 67 II. ANALYSIS

¶ 68 A. Evidence of PTSD

¶ 69 Defendant first argues that the trial court deprived him of his right to present a complete defense where it excluded the testimony of two experts who would have testified that they diagnosed defendant with PTSD. According to defendant, this testimony was critical to supporting his claim that he accidentally shot Gourdine because of his extreme fear of violence.

¶ 70 The State claims that defendant forfeited this issue by failing to make an offer of proof regarding the experts' prospective testimony. And, the State alleges, even if an offer of proof had been made, the testimony was inadmissible because it would encroach on the jury's prerogative to determine defendant's state of mind.

¶ 71 A criminal defendant has a constitutional right to a " 'meaningful opportunity to present a complete defense.' " *People v. Burgess*, 2015 IL App (1st) 130657, ¶ 133 (quoting *People v. Ramirez*, 2012 IL App (1st) 093504, ¶ 43); see also U.S. Const., amends. VI, XIV; Ill Const. 1970, art. I, § 8. When, as in this case, a party claims that his right to present a complete defense was denied due to improper evidentiary rulings, we apply an abuse-of-discretion standard of review. *Burgess*, 2015 IL App (1st) 130657, ¶ 133. "A trial court abuses its discretion when its decision is fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it." (Internal quotation marks omitted.) *People v. Kladis*, 2011 IL 110920, ¶ 23.

¶ 72 "When a trial court refuses evidence, no appealable issue remains unless a formal offer of proof is made." *People v. Peeples*, 155 Ill. 2d 422, 457 (1993). Moreover, "[a]n offer of proof that merely summarizes the witness' testimony in a conclusory manner is inadequate." *People v. Andrews*, 146 Ill. 2d 413, 421 (1992). "Rather, in making the offer of proof, counsel must explicitly state what the excluded testimony would reveal and may not merely allude to what might be divulged by the testimony." *Id.* The reason for this requirement is so that the trial and reviewing courts can assess "the admissibility of the testimony which was foreclosed by the sustained objection." *Id.*

¶ 73 We agree with the State that the absence of an offer of proof precludes our ability to review the admissibility of the expert testimony. All that we know is that both experts would disclose that they diagnosed defendant with PTSD. We do not know how they would describe his symptoms, how PTSD affected defendant's behavior, or how PTSD could impact his state of mind. Without any of these specifics, we are left with a general diagnosis that is insufficient to demonstrate the admissibility of the experts' testimony. See, *e.g.*, *People v. Jackson*, 180 Ill. App. 3d 78, 91 (1989) (exclusion of expert testimony diagnosing defendant with battered woman syndrome inadmissible where there was no offer of proof to reveal specifics of testimony).

¶ 74 In his reply brief, defendant does not contest counsel's failure to make an offer of proof, but responds that he "raised this issue in his post-trial motion." While that is true, the posttrial motion does not disclose the specifics of the experts' proffered testimony. Counsel did not attach copies of reports drafted by the experts or otherwise reveal the specifics of their diagnoses. See, *e.g.*, *People v. Minnis*, 118 Ill. App. 3d 345, 354 (1983) (where court precluded counsel from making offer of proof regarding experts' diagnoses of battered woman syndrome, court could review admissibility because counsel attached experts' reports and defendant's hospital records

to posttrial motion). Thus, we cannot meaningfully review the exclusion of this evidence, and we find that defendant has forfeited such review.

¶ 75 Defendant also argues that his attorney's failure to make an adequate offer of proof constituted ineffective assistance of counsel. But once again, we do not know what the experts would have testified to, or what counsel should have included in his offer of proof. Without knowing the substance of the experts' testimony on this direct appeal, we cannot say whether trial counsel was ineffective. See, *e.g.*, *People v. Atherton*, 406 Ill. App. 3d 598, 619 (2010) (court could not find counsel ineffective for failing to make offer of proof "as there is no indication in the record what the offer of proof would have been"); *People v. Bauer*, 393 Ill. App. 3d 414, 424 (2009) (trial counsel could not be found ineffective due to failure to obtain expert where no offer of proof was in record); *People v. Neylon*, 327 Ill. App. 3d 300, 312 (2002) (when record does not contain adequate offer of proof, claims of ineffective assistance of counsel are more properly raised in postconviction petition, where complete record can be made).

¶ 76 B. Prosecutorial Misconduct

¶ 77 Defendant next claims that the prosecutors committed misconduct both during closing arguments and when attempting to impeach Rodolfo Roman with his written statement to the police. We address each argument in turn.

¶ 78 1. Closing Arguments

¶ 79 Defendant first challenges several comments made during the prosecution's closing arguments, alleging that they were not supported by the evidence. The State notes that this argument is forfeited because defense counsel did not object to the comments at trial and that the comments were proper inferences drawn from the evidence.

¶ 80 Several of the comments with which defendant takes issue on appeal were not objected to by trial counsel. Thus, defendant has forfeited review of these issues on appeal. See *People v. Singleton*, 367 Ill. App. 3d 182, 190 (2006) (defendant must object to prosecutor's comments in closing argument to preserve issue on appeal). But defendant argues that these comments constituted plain error requiring reversal despite his forfeiture. See *People v. Thompson*, 238 Ill. 2d 598, 613 (2010) ("The plain-error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances."). The first step in a plain-error analysis is to determine whether any error occurred at all. *People v. Sargent*, 239 Ill. 2d 166, 189 (2010).

¶ 81 Prosecutors have a great deal of latitude during closing argument and may comment upon and draw reasonable inferences from the evidence presented. *People v. Hudson*, 157 Ill. 2d 401, 441 (1993). But they may not argue assumptions or facts not contained in the record. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). Nor may a prosecutor misstate the evidence during closing argument. *People v. Carlson*, 92 Ill. 2d 440, 449 (1982). When reviewing alleged impropriety in the State's closing arguments, we view the arguments in their entirety and consider the challenged remarks in context. *Id.*

¶ 82 Prosecutorial misconduct in closing argument warrants a new trial if the improper remarks were a material factor in the conviction. *People v. Linscott*, 142 Ill. 2d 22, 28 (1991). In other words, we will find reversible error "only if *** the improper remarks were so prejudicial that real justice was denied or that the verdict resulted from the error." *People v. Runge*, 234 Ill. 2d 68, 142 (2009).

¶ 83 The State urges us to apply an abuse of discretion standard of review. There appears to be a conflict among Illinois Supreme Court cases regarding the correct standard for reviewing a

prosecutor's remarks during argument. *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 32. The decisions in *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), and *People v. Sims*, 192 Ill. 2d 592, 615 (2000), suggest that we should review this issue *de novo*. *Hudson*, 157 Ill. 2d at 441, suggests that we should review this issue for an abuse of discretion. We need not take a position in this case because, under either standard, defendant's claims fail.

¶ 84 Defendant primarily takes issue with the State's arguments concerning defendant's motive. During her opening and rebuttal arguments, the prosecutor repeatedly suggested that defendant and Gourdine were experiencing financial difficulties that strained their relationship. She highlighted the fact that defendant and Gourdine were no longer having sex, suggesting that their sexual difficulties were a result of their disagreements about money. And she argued that defendant had shot Gourdine after an argument between them had escalated.

¶ 85 We agree with the State that it was reasonable to infer that defendant shot Gourdine in a fit of rage. The evidence showed that defendant shot Gourdine three times, twice at close range, and fired multiple shots throughout the house. He broke windows, broke a lamp, and tore the blinds from the front windows of the house. Relying on this evidence, it was reasonable for the prosecutor to argue that defendant shot Gourdine in a fit of anger. While defendant presented evidence that the shooting was an accident, and that he was not arguing with Gourdine prior to the shooting, the State was not required to accept defendant's version of events during closing argument. See *People v. Bratton*, 178 Ill. App. 3d 718, 725 (1989) (in closing argument, "[t]he prosecutor is *** entitled to assume the truth of the State's evidence").

¶ 86 But we disagree that the prosecutor's comments about the couple's financial and sexual frustrations were supported by the evidence. To the contrary, the only evidence of their prior relationship depicted them as a happy couple. Indeed, while Thigpen testified that he and

defendant had discussed his unemployment several times, Thigpen noted that he had never seen defendant and Gourdine argue about money, and that defendant had never complained about being out of work. For the prosecution to insinuate that defendant shot Gourdine over mounting financial disputes strayed too far from drawing reasonable inferences.

¶ 87 The State maintains that this line of argument was a reasonable response to defense counsel's discussion of the State's lack of evidence of motive. While defense counsel did argue that the State had failed to establish any motive for the shooting, he did so only after the prosecutor had insinuated that the shooting had been the product of simmering tension over defendant's money problems and the couple's intimacy issues. Defense counsel simply responded to the State's arguments regarding defendant's possible motive.

¶ 88 In sum, we conclude that it was improper for the prosecutor to speculate that defendant and Gourdine had financial and sexual problems, and that those problems led to defendant's shooting Gourdine. We now turn to the question of whether those comments constituted plain error requiring reversal despite defendant's forfeiture.

¶ 89 There are two ways in which a defendant may establish plain error: (1) by showing that the evidence was closely balanced such that the improper closing argument could have threatened to tip the scales against him; or (2) by showing that the error, regardless of the strength of the State's evidence, was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *People v. Adams*, 2012 IL 111168, ¶ 21. Defendant does not precisely articulate which prong of the plain-error doctrine he pursues in this case, but we will address both.

¶ 90 Under the first prong, "we must make a commonsense assessment of the evidence [(citation)] within the context of the circumstances of the individual case." (Internal quotation

marks omitted.) *Id.* ¶ 22. Here, there was no dispute that defendant shot Gourdine three times. The State's evidence showed that defendant fired numerous bullets throughout his house, broke the front window to his home with a piece of a broken lamp, and tore down blinds in the front room. Once the police arrived, Gourdine told them that defendant had just started shooting and that no one else was in the house. Put simply, the State's evidence against defendant was strong.

¶ 91 In contrast, it is fair to say that defendant's testimony, and his theory of the case, strain credibility. Defendant claimed that he was afraid someone was in his house, that he shot Gourdine by mistake, and that he then proceeded to go on a shooting spree throughout his house because he was still afraid of the presence of a possible intruder. First of all, defendant claimed that his heightened fear of home invasions and violence led him to shoot Gourdine. But when Gourdine told him there was an intruder inside, defendant was not even in the house, and Gourdine was at the back door by the yard. Instead of *avoiding* the intruder—something someone who was deeply afraid of being attacked might do—and seeking help via a neighbor or contacting the police, defendant claimed that he went inside, along with Gourdine and their dogs, to ferret out the intruder. Of course this is a conceivable scenario, but a finder of fact would have been more than justified in finding this portion of the testimony, alone, rather curious.

¶ 92 More importantly, defendant's story makes no sense in light of the undisputed evidence of his behavior after the shooting. He claimed that he continued to fire his gun wildly throughout the house because he was afraid someone was still inside. But according to defendant, by the time he had accidentally shot Gourdine, he had already checked the other rooms in the house. He no longer needed to fear being ambushed in the utility room, kitchen, or living room, all areas where defendant had discharged his gun. Again, while defendant's version of events is not outside the realm of possibility, it is rather far-fetched.

¶ 93 Defendant also claimed that, by firing his weapon, he hoped to get his neighbors' attention. But firing a gun wildly was an unlikely method to *attract* people to come to defendant's aid. In sum, defendant's unlikely explanation for the shooting does not render the evidence closely balanced. See *Adams*, 2012 IL 111168, ¶ 22 (finding no first-prong plain error where "defendant's explanation of events, though not logically impossible, was highly improbable").

¶ 94 We recognize that the State had no strong evidence of defendant's motive in shooting Gourdine, but the State was not obligated to establish defendant's motive. See *People v. Carson*, 238 Ill. App. 3d 457, 464 (1992) (State not required to prove motive). And the State certainly had ample evidence showing that defendant intentionally shot Gourdine given her numerous wounds, the evidence showing that defendant had gone on a shooting spree throughout the house, and the evidence that defendant caused other damage to the house.

¶ 95 We do not find the evidence at trial to have been closely balanced. The first prong of the plain-error doctrine is not applicable here.

¶ 96 Turning to the second prong of plain error, that prong is met where a defendant can show that a prosecutor's improper comments were "so serious that [they] affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *Adams*, 2012 IL 111168, ¶ 24. Defendant cites *People v. Harbold*, 220 Ill. App. 3d 611 (1991), in support of his claim that the prosecutor's comments on defendant's possible motive were reversible error in this case. In *Harbold*, this court did hold that the prosecution's "pure speculation" regarding the defendant's motive during closing argument was reversible error. *Id.* at 617. But a key fact sets this case apart from *Harbold*: in *Harbold*, the trial court had *expressly forbidden* the State from introducing evidence of the defendant's motive at trial. *Id.* at 612. In fact, the defendant had

previously won a new trial because the State's motive evidence was inadmissible. *Id.* at 617. Thus, the State's motive argument was "a back door attempt to present the jury with a motive when evidence of motive was specifically excluded from trial." *Id.* at 618. Moreover, in *Harbold*, the "defendant's conviction rested solely on circumstantial evidence which was closely balanced," increasing the impact of the prosecution's comment on the defendant's conviction. *Id.* Here, the prosecution did not violate any evidentiary rulings of the trial court by speculating on defendant's motive. Nor was the evidence closely balanced, as we explained above.

¶ 97 And several cases have held that, in similar circumstances, a prosecutor does not commit plain error when speculating as to a defendant's motive. See, *e.g.*, *People v. Robinson*, 254 Ill. App. 3d 906, 920-21 (1993) (no plain error where prosecutor argued that possible motive for shooting of cab driver was armed robbery even though there was no evidence that defendant took anything from driver or tried to rob him); *People v. Dotson*, 214 Ill. App. 3d 637, 647 (1991) (not improper for prosecutor to argue that defendant's motive in killing victim was that defendant lost fight, where there was evidence that defendant had fought victim, but no evidence as to who won); *People v. Bennett*, 159 Ill. App. 3d 172, 181-82 (1987) (no reversible error where prosecutor "speculated as to a conversation which may have occurred with regard to [an] argument" between victim and defendant).

¶ 98 Nor did the error go to the heart of the issues at defendant's trial, as motive was not an element of the charged offense—a fact that was pointed out by both defense counsel and the prosecutor during their arguments. In those cases where our supreme court has found second-prong plain error due to improper closing arguments, the improper comments generally affect a fact critical to the outcome, are inflammatory or prejudicial, or undermine a defendant's constitutional rights. See, *e.g.*, *People v. Mulero*, 176 Ill. 2d 444, 466-67 (1997) (plain error to

suggest that defendant's exercise of fourth-amendment rights by filing of motion to suppress should be considered as aggravating factor at capital sentencing hearing); *People v. Mullen*, 141 Ill. 2d 394, 404 (1990) (plain error to comment on eyewitness's fear in testifying, where there was no evidence to support claim and such evidence had been excluded by trial court); *People v. Adams*, 109 Ill. 2d 102, 126 (1985) (plain error at capital sentencing hearing where prosecution told jury that defendant was eligible for death penalty based on statutory factor that did not apply to case); *People v. Szabo*, 94 Ill. 2d 327, 363-64 (1983) (finding plain error at capital sentencing hearing where prosecutor referred to statistics on rising murder rates and on efficacy of death penalty in deterring crime); *People v. Dukett*, 56 Ill. 2d 432, 443 (1974) (racial comments during closing argument were plain error); *People v. Burton*, 44 Ill. 2d 53, 55-56 (1969) (comment on defendant's failure to explain blood stain was plain error because it undermined defendant's right against self-incrimination). The prosecutor's speculation regarding defendant's motive did not rise to this level of error. We conclude that it did not undermine the integrity of the judicial process under the second prong of the plain-error doctrine.

¶ 99 Having determined that the prosecutor's comments regarding defendant's motive were not plain error, we now turn to the comments to which defendant objected at trial, *i.e.*, his preserved claims of error.

¶ 100 Defendant contends that the prosecutor misstated Thigpen's testimony about his conversations with defendant when she argued:

> "And then his friend testifies on his behalf and tells you, 'Well, we've talked many times about the fact that he's very upset about how he isn't working, hasn't been working, hasn't been working for months. He has not been paying any of the bills. He is upset about that.' "

The prosecutor also said that Thigpen testified that defendant was "desperate for work," had been looking for work "for months," and that his unemployment was "a source of contention." Defendant contends that the prosecutor misconstrued Thigpen's testimony about his conversations with defendant. Defendant notes that Thigpen actually testified that defendant was not angry about his job search and "never complain[ed]" about being unemployed. Nor did Thigpen say that defendant had not paid his bills.

¶ 101 We agree that the prosecutor misconstrued Thigpen's testimony. But we find that, for two reasons, her comments did not prejudice defendant. First, the comments were relatively brief in the context of lengthy closing arguments. See *People v. Runge*, 234 Ill. 2d 68, 142 (2009) (comments in closing argument not prejudicial where they "were brief and isolated in the context of lengthy closing arguments"). Second, after each comment, the trial court instructed the jury that closing arguments were not evidence and that the jurors should use their "collective memories" to determine what the testimony was. The trial court delivered that instruction again at the end of closing arguments. See *People v. Kliner*, 185 Ill. 2d 81, 159 (1998) (instructions "that closing arguments are not evidence and to disregard any arguments not based on the evidence *** can serve to alleviate any possible prejudice from an erroneous comment by the State"). Thus, any potential prejudice was alleviated.

¶ 102 Finally, defendant takes issue with the prosecutor's comment that defendant tore down the blinds in the house. Defendant claims that there was no evidence to support this claim because the police officers who tasered his dogs were the ones who tore down the blinds. Defendant is incorrect. The evidence showed that there were two sets of blinds damaged: the blinds to the bedroom window, which the police tore down, and the blinds in the living room at the front of the house. Commander Baugh testified that he saw that the living room blinds were

on the ground when he entered the front door. The prosecutor did not mischaracterize the evidence when she said that defendant tore down the blinds in the house; she was not referring to the blinds torn down by the police. We reject this point of error.

¶ 103 2. Improper Impeachment

¶ 104 Defendant also argues that the prosecution committed misconduct during the cross-examination of Rodolfo Roman. Specifically, defendant argues that the prosecutor, in attempting to impeach Roman with the statement he gave to the police after the shooting, improperly suggested that Roman's statement did not include anything about defendant screaming for help when, in fact, the statement did say that Roman heard defendant screaming for help.

¶ 105 During direct examination, Roman testified that, after the shooting began and he crossed the street, he heard defendant "[c]alling for Miss Karen. Saying help Karen." Karen was defendant's neighbor who lived across the street. During cross-examination, the State attempted to impeach Roman via leading questions that suggested that he did not include this information in his statement to the police. But as defendant points out, Roman's statement said that, shortly after the police arrived on the scene but before they arrested defendant, he "was screaming something like, 'Help me!' " In its rebuttal case, the State called Commander Baugh to testify that Roman never told him that he heard defendant yell, " 'Miss Karen, help me! Help me, Miss Karen!' " State's Exhibit 88, Roman's handwritten statement, was not sent back to the jury room for the jurors to review during their deliberations.

¶ 106 "It is improper for the prosecutor to ask a witness questions for purposes of impeachment unless the prosecutor is prepared to offer proof of the impeaching information." *People v. Olinger*, 112 Ill. 2d 324, 341 (1986). Without proof of the allegedly impeaching information, there is a danger that the jury will "make a presumption that the insinuation created by the

[prosecution's] questions is accurate, and substitute the presumption for proof." *People v. Williams*, 204 Ill. 2d 191, 212 (2003). But the State's inability to substantiate will require reversal "only where the insinuations are substantial, repeated, and definitely prejudicial." *People v. Robinson*, 221 Ill. App. 3d 1045, 1051 (1991); *People v. Jurczak*, 147 Ill. App. 3d 206, 217 (1986).

¶ 107 For example, in *Jurczak*, the prosecution asked the defendant, who was on trial for murdering his wife, whether he had ever hit his wife with a crutch, and the defendant responded that he did not remember. While the prosecution's question was left unsubstantiated, the court held that the lone question was not reversible error because there "was no extended pattern of unsupported insinuation." *Jurczak*, 147 Ill. App. 3d at 217. The court also noted that the prosecution did not refer to the insinuation during closing arguments, and that there was other evidence that the defendant had physically abused his wife. *Id.* Thus, the court concluded that the error was not prejudicial. *Id.*

¶ 108 By contrast, defendant cites *People v. Rivera*, 145 Ill. App. 3d 609 (1986), in support of his argument that the State's impeachment of Roman was improper. But in *Rivera*, the State attempted to suggest that a defense witness was testifying for the defendants because her husband was a member of the Latin Kings, the same gang with which the defendants were allegedly affiliated. *Id.* at 619. Over the "repeated objections" of defense counsel, the State asked, without substantiating evidence, whether the witness's husband " 'hung around' " with Latin Kings, whether he was a senior member of the gang, and whether he supplied the gang with drugs. *Id.* at 616. The prosecutor then emphasized the witness's affiliation with the Latin Kings in closing argument. *Id.* at 621. The court held that this improper insinuation was reversible error because it constituted a "calculated attempt to impeach [the witness] by the

insinuations themselves, rather than an innocent attempt to explore her bias." *Id.* And, the court emphasized, the witness "was the key defense witness, and her credibility was the foundation of the defense case." *Id.*

¶ 109 We find that this case more closely resembles *Jurczak* than *Rivera*. Like the prosecutor in *Jurczak*, the prosecution in this case did not engage in an extended pattern of unsubstantiated insinuation during cross-examination. Instead, the prosecution asked two brief questions during cross-examination, and one question during its direct examination of Commander Baugh during the State's rebuttal case. And the prosecutor did not bring up the impeachment of Roman during her closing arguments.

¶ 110 Nor was Roman's testimony the centerpiece of the defense case, like the witness's testimony in *Rivera*. Defendant's own testimony was the integral part of his case, as only he testified that the shooting was an accident. Roman simply provided some corroboration for defendant's testimony that he and Gourdine were not fighting that day, and that defendant screamed for help after he started shooting. Because the unfounded insinuations were relatively brief, and Roman's testimony regarding defendant's screams was not critical to the defense case, we cannot conclude that the State's improper cross-examination was prejudicial.

¶ 111 For similar reasons, we disagree with defendant's argument that his trial counsel was ineffective for failing to rehabilitate Roman's testimony on redirect by drawing his attention to the portion of his statement that indicates that he heard defendant scream, "Help me." In order to show that his attorney was ineffective, a defendant must establish two elements: (1) that his attorney's performance was deficient, *i.e.*, that it "fell below an objective standard of reasonableness" (*Strickland v. Washington*, 466 U.S. 668, 688, 695 (1984)); and (2) that he was prejudiced by his attorney's deficient performance, *i.e.*, "that there is a reasonable probability

that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*id.* at 695). In light of our above determination that the improper impeachment played a minor role in defendant's trial, we cannot conclude that there was a reasonable probability that outcome of the trial would have been different had counsel rehabilitated Roman's testimony. Moreover, as we discussed above, the State's evidence was strong when compared to defendant's improbable description of the shooting. Thus, defendant cannot establish any prejudice from counsel's failure to point out the State's improper impeachment, and defendant's ineffectiveness claim must fail. See *People v. Hale*, 2013 IL 113140, ¶ 17 (court "may dispose of an ineffective assistance of counsel claim by proceeding directly to the prejudice prong without addressing counsel's performance").

¶ 112 C. Dying Declaration

¶ 113 Defendant next argues that the trial court erred in permitting the State to introduce evidence that Gourdine told Officer Sweitzer that defendant shot her and that no one else was in the house. Defendant contends that this statement was hearsay, and that the State failed to present evidence that Gourdine made this statement in anticipation of her imminent death. The State argues that the trial court properly relied on the dying-declaration exception to the hearsay rule.

¶ 114 Judicial review of the admissibility of evidence typically invokes the abuse-of-discretion standard. *People v. Patterson*, 154 Ill. 2d 414, 461 (1992); see also *People v. Bowen*, 183 Ill. 2d 103, 120 (1998) (admissibility of evidence under hearsay exception reviewed for abuse of discretion). "An abuse of discretion occurs only where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree with it." (Internal quotation marks omitted.) *People v. Lerma*, 2016 IL 118496, ¶ 23. This court has, at times,

invoked that standard in considering the admissibility of a dying declaration. See, *e.g.*, *People v. Newell*, 135 Ill. App. 3d 417, 428-29 (1985).

¶ 115 In *People v. Tilley*, 406 Ill. 398, 407 (1950), our supreme court did not explicitly set out the standard of review for determining the applicability of the dying-declaration exception but, after noting that the issue involved questions of credibility and weight, ultimately ruled that "there was a sufficient foundation laid for the introduction of the dying declaration into evidence." In *People v. Odum*, 27 Ill. 2d 237, 244 (1963), our supreme court again articulated no specific standard of review but, in rejecting a purported dying declaration, held that "[f]rom the entire record we find an insufficient basis for the introduction of evidence of decedent's statements." Some appellate courts have followed that standard on this question. See *People v. Crayton*, 175 Ill. App. 3d 932, 954 (1988) ("The standard for judicial review of the admission of dying declarations is whether the record supports the trial court's factual determination.");*People v. Montague*, 149 Ill. App. 3d 332, 345 (1986) ("The standard for judicial review of the admission of dying declarations is whether the record supports the trial court's factual determination.").

¶ 116 More often and more recently, however, this court has held that a trial court's finding that a statement qualifies as a dying declaration is subject to the somewhat less deferential manifest-weight-of-the-evidence standard, where we will defer to the trial court's findings unless the opposite conclusion is clearly evident. See, *e.g.*, *People v. McCoy*, 2016 IL App (1st) 130988, ¶ 82; *People v. Robinson*, 2013 IL App (1st) 102476, ¶ 54; *People v. Graham*, 392 Ill. App. 3d 1001, 1005 (2009); *People v. Hatchett*, 397 Ill. App. 3d 495, 502 (2009).

¶ 117 We need not resolve any conflict in the appropriate standard of review, because our conclusion is the same under any of these standards.

¶ 118 Generally, hearsay evidence—evidence of an out-of-court statement used to prove the truth of the matter asserted in that statement—is inadmissible. Ill. R. Evid. 801(c), 802 (eff. Jan. 1, 2011). But there is an exception to that rule for dying declarations—statements made by a declarant while he or she believed that his or her death "was imminent, concerning the cause or circumstances of what the declarant believed to be impending death." Ill. R. Evid. 804(b)(2) (eff. Jan. 1, 2011). "A statement is admi[ssible] as a dying declaration when it is shown beyond a reasonable doubt that: '(1) the declaration pertains to the cause or circumstance of the homicide; (2) the declarant must believe that death is imminent; and (3) the declarant must possess the mental faculties sufficient to give and accurate statement about the circumstances of the homicide.' " *Hatchett*, 397 Ill. App. 3d at 502 (quoting *People v. Georgakapoulos*, 303 Ill. App. 3d 1001, 1009 (1999)).

¶ 119 Defendant only challenges the second element in this case. Our supreme court has stated that this element is met when the victim makes the statement "under the fixed belief and moral conviction that death is impending and certain to follow almost immediately, without opportunity for repentance and in the absence of all hope of avoidance, when he has despaired of life and looks to death as inevitable and at hand." *Odum*, 27 Ill. 2d at 242-43. "Belief in the imminence of death may be shown by the declarant's own statements or from circumstantial evidence, such as the nature of the wounds or statements made in his presence." (Internal quotation marks omitted.) *Hatchett*, 397 Ill. App. 3d at 502-03.

¶ 120 Here, there was sufficient circumstantial evidence to establish that Gourdine believed that she was dying when she made that statement. Gourdine had been shot three times in the chest, abdomen, and back. She was found lying face-down in a pool of blood. Officer Sweitzer described her breathing as "very shallow" and "very labored." She told the officers that she

needed help and that she could not breathe. Baugh testified that Donegan told her "that she was injured pretty severely." Sweitzer said that Baugh told Gourdine "that her wounds appeared to be very serious and [that] she may not survive." Only after they told her this did she tell them that defendant had shot her and that no one else was in the house. In light of the severity of Gourdine's wounds, her difficulty breathing, and the officers' remarks regarding her injuries, we will not disturb the trial court's determination that Gourdine made her statement under the belief that her death was imminent.

¶ 121 We find that this case is analogous to *People v. Walker*, 262 Ill. App. 3d 796, 801-02 (1994), where this court held that the victim's statement that the defendant had shot him was admissible as a dying declaration. The defendant had shot the victim twice in the back. *Id.* at 798. This court held that, despite the absence of any direct evidence that the victim believed he was dying, the circumstantial evidence showed that the victim believed that death was imminent: "[T]he victim complained of being unable to breathe, he knew he had been shot twice in the back, he was bleeding from his wounds, and was in such pain that he asked that no one touch him." *Id.* at 801. The circumstances of this case are substantially the same: Gourdine was shot three times in vital areas, was lying in a pool of her own blood, and said that she could not breathe. Like the court in *Walker*, we cannot say that the trial court erred in admitting her statement as a dying declaration.

¶ 122 Defendant cites *People v. Montague*, 149 Ill. App. 3d 332 (1986), and *People v. Calvin*, 116 Ill. App. 2d 471 (1969), in support of his argument that the State failed to establish Gourdine's belief in her impending death, but those cases are distinguishable. In *Montague*, the defendant shot the victim twice: once in the wrist and once "in the chest-stomach area." *Montague*, 149 Ill. App. 3d at 337. A police officer told the victim his wounds were "very

serious" and asked the victim who shot him. *Id.* The victim told the officer that the defendant had shot him. *Id.* The court held that the victim's statement was inadmissible as a dying declaration because there was no indication that the victim believed he was dying. *Id.* at 346. The court noted that, when the officer arrived at the bar where the victim had been shot, "the victim was trying to leave the bar" and the officer had to tell him "to settle down." *Id.*

¶ 123 In *Calvin*, the defendant shot the victim three times in a diner. *Calvin*, 116 Ill. App. 3d at 474. After the shooting, a patron of the diner helped the victim leave the diner. *Id.* A police officer picked up the victim and drove him to the hospital. *Id.* at 479. On the way, the officer asked the victim what happened, and the victim said that a man walked into the diner for no reason. *Id.* At trial, the State asked the officer whether the victim was "imminently in fear of death," and he responded, "I believe he was, yes, sir." (Internal quotation marks omitted.) *Id.* The court held that the victim's statement was inadmissible because there was no evidence regarding the victim's state of mind; rather, "[t]he officer stated only what he believed was the state of mind of the deceased, without regard to anything the deceased might have said or done to evidence that state of mind." *Id.* at 479-80.

¶ 124 Unlike *Montague* and *Calvin*, where the victims were able to leave the scenes of the shootings after they had been injured, Gourdine was lying in a pool of her own blood, struggling to breathe, when she told the police that defendant has shot her. Moreover, Gourdine herself expressed the severity of her injuries when she told the officers that she could not breathe. Because Gourdine's injuries had a much more serious effect on her than on the victims in *Montague* and *Clark*, we do not find those cases persuasive.

¶ 125 Based on the circumstantial evidence of Gourdine's injuries and statements, we uphold the trial court's ruling admitting her statement as a dying declaration.[1]

¶ 126 D. Right to 12-Person Jury

¶ 127 Next, defendant argues that his right to a 12-person jury was violated when juror Jose Quezada served on the jury despite his difficulties understanding English. The State contends that defendant has forfeited review of this issue by failing to object to Quezada's placement on the jury.

¶ 128 At trial, defense counsel did not seek to strike Quezada on the basis that he spoke insufficient English or use a peremptory challenge to remove him. "The failure to challenge a juror for cause or by peremptory challenge waives any objection to that juror." *People v. Coleman*, 168 Ill. 2d 509, 546-47 (1995).

¶ 129 Nor does defendant make any attempt to overcome the State's forfeiture argument by arguing that the inclusion of Quezada on the jury was plain error. By failing to argue plain error, defendant has also forfeited that argument. *People v. Hillier*, 237 Ill. 2d 539, 545-46 (2010).

¶ 130 Defendant also does not contend that his attorney was ineffective for failing to strike Quezada. At most, defendant argues that his attorney should have questioned Quezada further: "Defense counsel made no attempt to question the juror about his knowledge and understanding of the English language." But he does not claim that counsel should have stricken Quezada or explain how counsel's acceptance of Quezada constituted deficient performance that prejudiced him. See *Strickland*, 466 U.S. at 687-88 (defendant arguing ineffective assistance of counsel

[1] We note that defendant raises his argument only in terms of the rules of evidence. He does not argue that the admission of Gourdine's statements violated his constitutional right to confront the witnesses against him.

must show that counsel performed deficiently and that deficient performance prejudiced defendant). Defendant has forfeited any contention that his attorney was ineffective for permitting Quezada to serve on the jury. See Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (appellant's brief must contain contentions of error with citations to relevant authority; *People v. Macias*, 2015 IL App (1st) 132039, ¶ 88 (failure to articulate ineffectiveness argument on appeal forfeited argument).

¶ 131 Thus, we conclude that defendant has forfeited review of this issue and we decline to reach the question on appeal. But we note that Quezada appeared to understand the questions posed to him during *voir dire*, and, at the hearing on defendant's posttrial motion, the trial court made explicit findings that Quezada appeared engaged and attentive throughout the trial. See *In re Commitment of Dodge*, 2013 IL App (1st) 113603, ¶¶ 25-27 (counsel not ineffective for failing to strike prospective jurors who expressed concern with their lack of proficiency in English, but who understood questions posed to them in *voir dire*).

¶ 132 E. Ineffective Assistance of Counsel

¶ 133 Defendant raises several reasons why his trial counsel was ineffective. We have already discussed above defendant's arguments that his attorney was ineffective for failing to make an offer of proof regarding the PTSD testimony and for failing to rehabilitate Roman after the State incorrectly cross-examined him. We now address his two remaining contentions of ineffective assistance: (1) that his attorney was ineffective for failing to introduce photographs of defendant's arm, which would have corroborated his testimony that he cut his arm escaping the 1998 attack; and (2) that his attorney was ineffective for failing to present the testimony of his neighbor who lived across the street, who would have corroborated Roman's testimony that defendant was crying for help.

¶ 134 Criminal defendants are entitled to the effective assistance of counsel at trial. U.S. Const. amend. VI, XIV; Ill. Const. 1970, art. I, § 8; *Strickland*, 466 U.S. at 687. To reiterate, defendant must establish two elements for a claim of ineffective assistance of counsel to succeed: (1) that his attorney's performance was deficient, *i.e.*, that it "fell below an objective standard of reasonableness" (*Strickland*, 466 U.S. at 688); and (2) that he was prejudiced by his attorney's deficient performance, *i.e.*, "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*id.* at 695).

¶ 135 Our supreme court has stated that, when the record is insufficient to address a claim of ineffective assistance of counsel, "such a claim should be brought on collateral review rather than on direct appeal." *People v. Ligon*, 239 Ill. 2d 94, 105 (2010). This court has elaborated that "[w]hen *** the defendant's ineffective-assistance-of-counsel claims require consideration of matters outside the record on direct appeal, a proceeding for postconviction relief is better suited for addressing defendant's claims because a complete record can be made." *People v. Millsap*, 374 Ill. App. 3d 857, 863 (2007).

¶ 136 Here, defendant's claims of ineffective assistance rely on evidence outside the record. Defendant claims that defense counsel "had photographs of defendant showing multiple scars from past attacks," but does not offer a citation to the record to support that notion. Our review of the record reveals no such photographs; only the photographs of defendant introduced by the State, which show no such scars. And defendant claims that defendant's neighbor across the street, Karen, "could have also testified regarding what she heard." But there is no indication in the record that Karen would *actually* corroborate Roman's testimony that he heard defendant screaming for help. Nor is there any information regarding whether counsel investigated the possibility of Karen's testimony. We cannot say that counsel was ineffective for failing to

introduce evidence when we have no idea what that evidence was. Because defendant's claims involve information outside the record, they are better raised in postconviction proceeding, and we decline to address them.

¶ 137 F. Cumulative Error

¶ 138 Finally, defendant claims that the totality of the above alleged errors deprived him of a fair trial. In some cases, "[i]ndividual trial errors may have the cumulative effect of denying a defendant a fair trial." *People v. Hall*, 194 Ill. 2d 305, 350 (2000). But we have already determined either that no error occurred, that no prejudice resulted from any errors that did occur, or that the record is insufficient to determine whether such an error occurred. Defendant's claim of cumulative error must fail.

¶ 139 III. CONCLUSION

¶ 140 For the reasons stated, we affirm defendant's conviction and sentence.

¶ 141 Affirmed.