2016 IL App (5th) 120505-U

NO. 5-12-0505

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 04-CF-393
	)	
BRIAN PINKAS,	)	Honorable
	)	James Hackett,
Defendant-Appellant.	)	Judge, presiding.

PRESIDING JUSTICE SCHWARM delivered the judgment of the court.
Justice Goldenhersh concurred in the judgment.
Justice Cates specially concurred.

ORDER

¶ 1 *Held*: The defendant's first-degree murder conviction is affirmed as the circuit court's evidentiary rulings did not deny him a fair trial, and the State's closing arguments to the jury did not constitute reversible error.

¶ 2 BACKGROUND

¶ 3 In March 2004, the defendant, Brian Pinkas, was indicted on one count of intentional first-degree murder (count I) and one count of knowing first-degree murder (count II). 720 ILCS 5/9-1(a)(1), (2) (West 2004). Both counts alleged that the defendant shot his live-in girlfriend, Sharon Reynolds, in the head with a shotgun, thereby causing her death.

¶ 4 In March 2005, the defendant entered a plea of guilty to count II and received a negotiated 20-year sentence. In December 2010, the defendant was given leave to withdraw his guilty plea after the sentence was deemed void on appeal. See *People v. Pinkas*, No. 5-08-0450 (2010) (unpublished order under Supreme Court Rule 23); see also *People v. White*, 2011 IL 109616.

¶ 5 In March 2012, the defendant elected to withdraw his guilty plea and proceed to trial. In September 2012, a jury trial commenced on count II only. Viewing the evidence adduced at trial in the light most favorable to the State, the jury could have concluded that on the night of February 14, 2004, after Sharon returned home from a bar that the defendant had been kicked out of earlier in the evening, the defendant had pummeled her, forcibly restrained her when she tried to escape, and then shot her in the face with a 12-gauge shotgun after twice announcing his intention to do so. Thereafter, the defendant made false statements suggesting that he had been asleep when Sharon arrived home and that he had accidently shot her when she woke him up. At trial, the State's key witness was Sharon's friend, Theresa Whittle, and the State's evidence established the following.

¶ 6 Sharon worked at Paddy Mc'Ds, a bar in Granite City. Sharon was married, but she and her husband had been separated for years. Prior to her death, Sharon and the defendant had been living together at the defendant's home on Raes Creek Drive in Granite City. Sharon was five feet, two inches tall and "weighed about 120 pounds." The record indicates that the defendant is six feet tall and weighs over 230.

¶ 7 On the morning of February 14, 2004, Theresa and her boyfriend, Jeff Johnson, went to the defendant's home to help Sharon and the defendant paint its interior. The defendant was trying to sell the house at the time, and the two couples had been working on it for several weeks. Sometime that afternoon, they decided that since it was Valentine's Day, they would quit and "go out for a while." Jeff and Theresa drove home, got cleaned up, and then returned to the defendant's house. From there, the couples drove separately to Paddy Mc'Ds.

¶ 8 After drinking at Paddy Mc'Ds for a while, the defendant got "belligerent" and started a fight with a bartender. As a result, he was asked to leave. The defendant, Sharon, Jeff, and Theresa left, but the back door to the bar had to be locked because the defendant "kept trying to [get] back in."

¶ 9 After leaving Paddy Mc'Ds, the couples spent several hours "bar hopping." At around 10:30 p.m., the last bar that they visited refused to serve Jeff because he was too drunk. At that point, Jeff drove home, intending to later pick Theresa up at the defendant's house. Sharon and Theresa subsequently took the defendant home and decided to go back out by themselves. When they dropped the defendant off, he told Sharon that he wanted her home by midnight. Sharon and Theresa eventually went back to Paddy Mc'Ds.

¶ 10 Shortly before midnight, Sharon and Theresa returned to the defendant's house on Raes Creek Drive. Both were intoxicated. When they arrived, the defendant, who was also intoxicated, was awake and noted that they had returned. When Sharon reminded the defendant that Theresa was going to be around until Jeff came to get her, the

defendant indicated that that was "fine." Sharon told Theresa to wait for Jeff downstairs in the basement. Sharon said, "Everything [would] be okay."

¶ 11 Theresa went to the basement as instructed and laid down on a couch. She subsequently heard Sharon hollering for her to come back upstairs. While walking back up the stairs into the living room, Theresa saw that Sharon and the defendant were standing near the loveseat by the banister at the top of the stairs. Sharon was crying and had blood on her face. As Sharon screamed, the defendant beat her with his left fist and threw her down on the loveseat. The defendant was holding a sawed-off 12-gauge pump shotgun with a pistol grip in his right hand, and he told Sharon "to open her mouth [so that] he could blow her fucking head off." When Theresa screamed at the defendant and asked him what he was doing, he told her to "shut [her] fucking mouth or [she] was going to be next." At that point, Theresa exited the house and fled to a neighboring home.

¶ 12 As Theresa was running away, she heard the defendant yell, "Sharon, look at me while I blow your fucking head off." Theresa then heard a gunshot.

¶ 13 The defendant subsequently called 9-1-1, reporting that he had "just killed [his] girlfriend." The defendant indicated that he was drunk and had been sleeping and that she had woken him up after coming home from a bar. The defendant asserted that "the gun wasn't supposed to be loaded," but "it was," and "the son of a bitch went off." When asked, the defendant advised that he had shot Sharon in the head and did not know if she was still breathing.

¶ 14 The police soon arrived at the house, and without incident, the defendant was taken into custody in the front yard. The defendant appeared calm, and when asked

where his girlfriend was, he said that she was inside and that he had shot her. At one point, the defendant spontaneously stated, "I was sleeping on the couch[,] and the bitch woke me up."

¶ 15 While being transported to the Granite City police department, the defendant again indicated that "he was passed out[,] and [Sharon] woke him up." Blood was subsequently observed on the defendant's pants and feet, and a small piece of brain matter was found stuck to his chest. There were also bruises and blood on the knuckles of both his hands.

¶ 16 Benjamin Koch, the Illinois State Police crime scene investigator who processed the scene at Raes Creek Drive, found two unspent 12-gauge shotgun shells on the living room floor near the shotgun that the defendant had used to kill Sharon. Koch collected the shotgun, the shells, and other times of evidence, and at trial, he identified dozens of photographs that he had taken during the course of his investigation.

¶ 17 At trial, Dr. Raj Nanduri, the pathologist who performed Sharon's autopsy, identified photographs showing numerous scratches and bruises on both of Sharon's arms. Nanduri testified that many of the bruises were consistent with "grabbing" or "hand print" bruises caused by "applying pressure with the hands." The scratches were consistent with "possible defensive wounds." Nanduri opined that the scratches and bruises on Sharon's arms had been inflicted "right around the time of her death."

¶ 18 Due to the extensive damage to Sharon's skull, Nanduri requested that it be reconstructed by an expert. The request was granted, and the reconstruction revealed that the pellets fired from the shotgun had entered the front-right side of Sharon's head before travelling in an upward-left direction towards the back as a "cone of projectiles."

Although the shotgun had not been touching Sharon's head when it discharged, the fatal shot "certainly wasn't a distance shot."

¶ 19 Sharon's brother, James Keene, testified that approximately six months before Sharon's death, he had spoken with her, and she had a "black eye" and a small cut near the side of her mouth. Sharon's husband, Robert Reynolds, testified that he had seen Sharon with bruises on her arms and face on one occasion after she had moved in with the defendant.

¶ 20 For the defense, the defendant's brother, Scott Pinkas, testified that in the fall of 2003, the defendant had shown him the sawed-off shotgun found at the crime scene and had attempted to fire it from the back deck of his home on Raes Creek Drive. Scott explained that when the gun had failed to discharge a shell that was in it, the defendant had pumped the gun and ejected the shell. The defendant then "stuck [the shell] back in" and tried to fire the gun a second time, but again, the gun did not discharge. When cross-examined, Scott acknowledged that he had not come forward with this information until he had been contacted by defense counsel's investigator a week before the trial.

¶ 21 Ronald Locke, the Illinois State Police firearms expert who examined the shotgun found at the crime scene, was also called as a witness for the defense. Locke testified that the gun's barrel had been sawed off and its stock replaced with a pistol grip. Locke testified that when he received the weapon, it was "jammed half open" with a discharged gunshot shell. There were also two live shells in the magazine tube. After unjamming the gun with a hammer, Locke discovered that when the weapon was racked, "the magazine shell notch would not release shells from the magazine." Using the shotgun to

demonstrate, Locke indicated that the notch "wouldn't drop down." To test fire the weapon, Locke therefore "hand-loaded two rounds," both of which fired.

¶ 22 Later, using "prime empty" rounds, Locke was able to make the gun discharge by closing the bolt without his finger on the trigger. In subsequent tests, the gun also fired prime empty rounds when struck with a hammer at various locations. Locke testified that he was not able to get the gun to fire prime empty rounds by striking the same locations with his fist. Locke further testified that due to the length of the bolt attaching the shotgun's pistol grip, moving the bolt could affect the functionality of the sear, prevent the hammer from cocking, and thus render the gun inoperable.

¶ 23 Locke testified that he had also examined the two unspent shotgun shells found on the living room floor. He testified that marks on the shells' extractor rims indicated that at some point, they had both been chambered in the shotgun. He further testified that there were "weak firing pin marks" on the primers of the shells. The marks were "not very deep" and were insufficient to discharge the primers. Locke was not questioned about the possible significance of the shells found on the living room floor.

¶ 24 The defense also called Sergeant Jenna DeYoung of the Granite City police department, who testified that following the defendant's arrest, he had been placed in a holding cell with his hands cuffed behind his back for over an hour and a half. At one point, the defendant slid off the chair in which he was sitting and fell to the floor. Defense counsel later suggested that the blood and bruises that had been observed on the defendant's knuckles were a result of the fall.

¶ 25 The defendant did not testify. Over the State's objection, the jury was given instructions on the offense of involuntary manslaughter (720 ILCS 5/9-3(a) (West 2004)).

¶ 26 During closing arguments, the State noted that it was not required to prove that the defendant had "intended to kill Sharon." The State explained that to find the defendant guilty of first-degree murder, the jury was only required to find that when performing the acts that caused Sharon's death, he knew "that such acts create[d] a strong probability of death or great bodily harm." The State argued that pointing a loaded shotgun to someone's head and pulling the trigger supported such a finding.

¶ 27 Referencing the defendant's 9-1-1 call, defense counsel argued that the defendant had thought that the shotgun was unloaded. Counsel suggested that the defendant had believed that the weapon was empty because he had "racked out" the two unspent shells found on the living room floor. Referencing Scott's testimony, counsel further argued that the defendant had also believed that the gun was inoperable. Counsel contended that the defendant had been "waving" the gun around because he did not think that it worked. Referencing Locke's testimony, counsel suggested that the gun might have accidentally discharged when the defendant either racked it "a third time" or "bumped into something." Counsel maintained that the case was "all about [the] gun." Counsel argued that the defendant had acted recklessly and that Sharon's death was a "terrible accident."

¶ 28 The jury ultimately rejected the defendant's claim that Sharon's death was an accident and returned a verdict finding him guilty of first-degree murder. In October 2012, after denying the defendant's motion for a judgment notwithstanding the verdict or, alternatively, for a new trial, the trial court sentenced him to serve 45 years in the Illinois

Department of Corrections. See 730 ILCS 5/5-8-1(a)(1)(a), (d)(iii) (West 2004). In November 2012, the defendant filed a timely notice of appeal.

¶ 29 DISCUSSION

¶ 30 The defendant maintains that he was denied a fair trial and advances four arguments in support of this claim. The defendant specifically contends that the trial court erred in (1) admitting gruesome photographs into evidence, (2) prohibiting him from presenting evidence that was allegedly relevant to his state of mind on the night that Sharon was killed, and (3) allowing the State to introduce testimony that Sharon had been abused on two occasions prior to her death. We note that all three of these issues were fully argued below and were also raised in the defendant's posttrial motion. As a fourth issue that the defendant raises for the first time on appeal, he further contends that he was denied a fair trial due to improper comments made by the State during its closing arguments to the jury. We will address each of the defendant's contentions in turn.

¶ 31 Crime Scene Photos

¶ 32 The defendant killed Sharon by firing a #7½ shotgun shell into the right-front side of her head. The pellets fired from the shotgun travelled through her head in an upward-left direction as a "cone of projectiles." The resulting blast blew the right side of her face off and displaced her brain and much of her skull. Blood, brain matter, and skull fragments were consequently dispersed throughout the living room of the defendant's home and into the adjoining entryway.

¶ 33 The defendant's first argument on appeal is that the trial court erred in allowing the jury to see crime scene photographs that were admitted into evidence as People's Exhibits

48, 50, 52, 53, and 60. Exhibits 48, 50, 52, and 53 show Sharon's body on the floor in front of the loveseat from different angles of the living room. Although Sharon's left arm is covering the remains of her face, the photos are bloody, and pieces of her eviscerated brain are visible in each. Exhibit 60 is a close-up shot of Sharon's head and upper torso that was taken after her corpse was "rolled over." The photo shows the extensive damage done to Sharon's face and is undoubtedly the most gruesome of all of the photographs that were admitted into evidence.

¶ 34 The five exhibits at issue were introduced during Koch's testimony and were used in conjunction with numerous other photos to describe the crime scene. Exhibit 60 was also among the exhibits that were used when Nanduri discussed Sharon's cranial injuries. On appeal, the defendant contends that the photos were not probative of any fact at issue and should not have been admitted given their graphic and gory nature. The defendant argues that because he did not contest that he had shot Sharon in the head with the shotgun, the trial court abused its discretion in admitting the exhibits. We disagree.

¶ 35 "It is well settled in Illinois that the admission into evidence of photographs of a crime victim is within the sound discretion of the trial court and, when the photographs are relevant to establish some material fact, they are admissible despite their gruesome nature." *People v. Hefley*, 109 Ill. App. 3d 74, 76 (1982). "Photographs of a decedent may be admitted to prove the nature and extent of injuries and the force needed to inflict them, the position, condition and location of the body, the manner and cause of death, to corroborate a defendant's confession, and to aid in understanding the testimony of a pathologist or other witness." *People v. Richardson*, 401 Ill. App. 3d 45, 52 (2010); see

also *People v. Starks*, 287 Ill. App. 3d 1035, 1042 (1997). When ruling on the admissibility of such photographs, the trial court must weigh each exhibit's prejudicial effect against its probative value, keeping in mind that "[c]ompetent evidence should not be excluded merely because it may arouse feelings of horror or indignation." *People v. Degorski*, 2013 IL App (1st) 100580, ¶ 100. "When a photograph serves no purpose other than to inflame and prejudice the jury, however, it must be excluded." *People v. Christen*, 82 Ill. App. 3d 192, 197 (1980).

¶ 36 Here, because the defendant maintained that Sharon's death was an accident, the precise manner and circumstances of her death were relevant issues at trial. *Cf. People v. Garlick*, 46 Ill. App. 3d 216, 224 (1977) (holding that a gruesome photograph of the victim's "massive head wound" should not have been introduced at trial where the defendant admitted that he had committed the offense of murder and the only contested issue was his sanity). The trial court conducted a thorough hearing on the admissibility of the State's proffered photographs and ultimately determined that Exhibits 48, 50, 52, 53, and 60 were relevant to show the location of Sharon's body in the living room, "where the gun was relative to the parties," and "where the gun was pointed" when it discharged. The court thus determined that although the photographs were gruesome, they were admissible as probative of "the issues of the manner in which [Sharon] was shot." *Cf. People v. Coleman*, 116 Ill. App. 3d 28, 35-36 (1983) (holding that an " 'absolutely hideous' " image of the victim's "decomposing, maggot-infested, partially autopsied body" should not have been admitted where it had "no probative value whatsoever").

¶ 37 We also note that after the trial court expressed concerns that exposing the jury to too many graphic photographs might prove more prejudicial than probative, the State withdrew numerous photos that the court indicated were duplicative of those already admitted and cropped Sharon's head out of the autopsy photos that were introduced during Nanduri's testimony. Additionally, during *voir dire*, the prospective jurors were advised that gruesome photographs would be presented at trial, and the ability to set aside one's emotional reactions to such images and determine a case on its facts was discussed. We lastly note that the record indicates that exhibits in question were briefly displayed using a projector and that none were sent back with the jury during its deliberations. We thus agree with the State's observation that "care was taken to limit the negative effect these pictures would have on the jurors."

¶ 38 "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Caffey*, 205 Ill. 2d 52, 89 (2001). Here, we cannot conclude that the trial court abused its discretion in admitting Exhibits 48, 50, 52, 53, and 60 into evidence.

¶ 39 Evidence of the Defendant's State of Mind

¶ 40 The week before the defendant's trial commenced, counsel disclosed that Scott, Debra Dycus, Kenny Dycus, and Bernice Pinkas would all testify that the defendant had told them that the sawed-off shotgun was inoperable. At a subsequent hearing, the State argued that the witnesses' proposed testimony was inadmissible hearsay, as it was "absolutely being offered for the truth of the matter asserted," *i.e.*, "that the gun didn't

work." Noting that the witnesses were the defendant's brother, sister, mother, and nephew, the State also questioned the reliability of the "self-serving" statements. Acknowledging that Scott had also indicated that he had witnessed the defendant unsuccessfully attempt to fire the gun, the State did not object to Scott's testimony regarding what he had seen.

¶ 41 In response, defense counsel maintained that the statements in question were admissible under the state-of-mind exception to the hearsay rule. Counsel explained that the witnesses would testify that at a family gathering in late November 2003, when the defendant was asked "why he left [the shotgun] laying around when various children were present," the defendant had indicated that the weapon was inoperable. Counsel argued that the testimony was therefore admissible to show that the defendant's state of mind on February 14, 2004, was that the weapon would not fire.

¶ 42 After several discussions regarding the matter, the trial court ultimately ruled that the statements were inadmissible. The court noted, among other things, that the defendant was attempting to establish his state of mind on the night of the shooting through statements that he had allegedly made months before.

¶ 43 On appeal, the defendant argues that the trial court erred in barring Debra, Kenny, and Bernice from testifying as to what the defendant had told them about the shotgun. The defendant again asserts that because his statements to the witnesses were not being offered to prove that the gun could not fire, they were admissible under the state-of-mind exception to the hearsay rule as evidence that he "believed the gun could not fire."

¶ 44 "Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted, and it is generally inadmissible due to its lack of reliability unless it falls within an exception to the hearsay rule." *People v. Olinger*, 176 Ill. 2d 326, 357 (1997). One such exception allows for the introduction of testimony regarding the declarant's state of mind "at the time of the utterance." *People v. Cloutier*, 178 Ill. 2d 141, 155 (1997). See also *People v. Hansen*, 327 Ill. App. 3d 1012, 1022 (2002). Rule 803(3) of the Illinois Rules of Evidence specifically provides for the introduction of a "statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including *** a statement of memory or belief to prove the fact remembered or believed ***." Ill. R. Evid. 803(3) (eff. Jan. 1, 2011).

¶ 45 Whether to allow evidence to be admitted pursuant to an exception to the hearsay rule is within the sound discretion of the trial court, and its decision will not be reversed absent an abuse of discretion. *Caffey*, 205 Ill. 2d at 89. As previously stated, "[a]n abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *Id.* Additionally, we can affirm the trial court's judgment "on any ground of record." *People v. Johnson*, 208 Ill. 2d 118, 129 (2003).

¶ 46 Here, given these deferential standards, we cannot conclude that the trial court abused its discretion in ruling that the statements at issue were inadmissible. See *People v. Dunmore*, 389 Ill. App. 3d 1095, 1105-09 (2009). Noting that the defendant was attempting to establish his state of mind on the night of the shooting through statements

that he had allegedly made months before, the trial court could have reasonably concluded that the statements lacked relevance due to their remoteness. See *People v. Morgan*, 197 Ill. 2d 404, 456 (2001) (noting that "a trial court may reject evidence on the grounds of relevancy if the evidence is remote, uncertain[,] or speculative"); see also *Robinson v. State*, 503 A.2d 725, 731 (Md. Ct. Spec. App. 1986) (holding that the hearsay statement at issue was properly excluded as remote where the defendant's "declaration of August 4 as to her state of mind on that day did not go directly to show anything about her state of mind on September 3 when the shooting occurred"); *State v. Harrison*, 378 N.W.2d 199, 203 (Neb. 1985) ("A declaration offered to show the defendant's state of mind which is too remote in point of time should be excluded as lacking probative value. *** In the present case the [properly] suppressed testimony related to a conversation which occurred 6 to 8 weeks before the shooting."). Given that the statements were provided by the defendant's brother, sister, mother, and nephew the week before trial and nearly nine years after the defendant's arrest, the court could have also excluded the statements on grounds that they were insufficiently reliable. See *Caffey*, 205 Ill. 2d at 89 (stating that a decision to admit evidence "cannot be made in isolation" and that "[t]he trial court must consider a number of circumstances that bear on that issue, including questions of reliability and prejudice"); *People v. Rincon*, 387 Ill. App. 3d 708, 723 (2008) (recognizing the credibility considerations attendant "where the defendant's witnesses are related to the defendant and failed to come forward during the initial investigation"); *People v. Hernandez*, 332 Ill. App. 3d 343, 351 (2002) (affirming the trial court's exclusion of hearsay evidence offered by the defendant's brother and

sister on the court's finding that the evidence was unreliable). Lastly, the trial court could have determined that given that Scott's testimony provided a sufficient basis for counsel to argue that the defendant believed that the gun was inoperable, the statements at issue were cumulative, and barring their admission did not inherently prejudice the defendant's defense. *Cf. People v. Quick*, 236 Ill. App. 3d 446, 453 (1992) (concluding that by barring the hearsay statements in question, "the trial court's rulings denied [the] defendant her constitutional right to present a defense"). "The admission of cumulative evidence is within the discretion of the trial court and its ruling will not be reversed where, as here, there was no clear abuse of discretion." *People v. Tolliver*, 347 Ill. App. 3d 203, 227 (2004).

¶ 47 In any event, even if we were to conclude that the trial court abused its discretion in refusing to admit the statements at issue, we would find that the error was harmless under the circumstances. See *Hernandez*, 332 Ill. App. 3d at 351-52. The improper exclusion of evidence will be deemed harmless beyond a reasonable doubt where the evidence of the defendant's guilt is overwhelming or the excluded evidence would have been duplicative or cumulative of other evidence presented. *People v. Tabb*, 374 Ill. App. 3d 680, 690 (2007). Here, we agree with the State's suggestions that both conditions are applicable. As noted, for all practical purposes, the statements in question would have been cumulative of Scott's testimony. Moreover, viewed in the light most favorable to the State, the evidence presented for the jury's consideration overwhelmingly supported its finding that the defendant was guilty of first-degree murder.

¶ 48 As previously noted, citing Scott's testimony, Locke's testimony, and the defendant's 9-1-1 call, defense counsel maintained that the defendant believed that the shotgun was either inoperable or unloaded and that Sharon's death was a "terrible accident." Counsel suggested that the defendant might have been unloading the weapon when it unexpectedly fired. Counsel further suggested that the defendant believed that the weapon was empty because he had "racked out" the two unfired shells found on the living room floor.

¶ 49 Scott's testimony, however, was severely impeached by his admission that although the defendant had been arrested for Sharon's murder in February 2004, he had not disclosed what he had allegedly witnessed on the deck of the defendant's home until a week before the defendant's September 2012 trial. Additionally, Scott's testimony did not preclude the possibility that the integrity of the shotgun shell that the defendant had attempted to fire off the deck had been compromised.

¶ 50 Locke testified that the shotgun was susceptible to accidental discharge. Whatever mechanical problems the gun might have had, however, Locke explained that when he test fired the weapon, it had properly discharged with a pull of its trigger. Locke further explained that because the gun's magazine would not feed shells into its chamber, shells had to be hand-loaded into the gun. Locke also testified that there were two live shells in the magazine tube. The jury could have thus concluded that the unfired shells found on the living room floor had been manually removed from the tube and hand-loaded before being ejected. Moreover, to the extent that the defendant might have believed that the gun would not fire or would not fire consistently, the shells on the floor had extractor

markings and primer indentations indicating that their discharge had been attempted. The jury could have therefore concluded that whatever the defendant's beliefs about the shotgun might have been, he had been determined to make the weapon work on the night of February 14, 2004, and had made two attempts to shoot Sharon in the face before ultimately doing so. Under such circumstances, the defendant would be guilty of knowing first-degree murder even assuming that he had been uncertain that the weapon would actually fire.

> "A person who knows, *i.e.*, is consciously aware, that his acts create a strong probability of death to another may not have such death as his conscious objective or purpose. [Citation.] He may simply not care whether the victim lives or dies. Under these circumstances, the person would be guilty of murder although the death was caused 'unintentionally.' " *People v. Deacon*, 130 Ill. App. 3d 280, 287-88 (1985).

¶ 51 With respect to the defendant's 9-1-1 call, although the defendant had advised the 9-1-1 operator that "the gun wasn't supposed to be loaded" and that it just "went off," he never indicated that he did not believe that the weapon would fire. The jury could have further concluded that the defendant's assertions that the gun "wasn't supposed to be loaded," that the gun just "went off," that Sharon had woken him up, and that he was not sure if she was still breathing, were all false exculpatory statements evidencing his consciousness of guilt. See *People v. Milka*, 211 Ill. 2d 150, 181 (2004); *People v. Muhammad*, 257 Ill. App. 3d 359, 368 (1993).

¶ 52 The jury also heard that the defendant had started a fight with one of Sharon's coworkers earlier in the evening and that immediately before shooting Sharon, he had threatened to kill Theresa and had twice announced his intention to "blow [Sharon's] fucking head off." The location of the fatal gunshot wound and the evidence that the defendant had battered Sharon and restrained her with significant force further disproved the defendant's claim that the shooting was an accident. See *People v. DiVincenzo*, 183 Ill. 2d 239, 249, 251-53 (1998) (noting that "[t]he basic difference between involuntary manslaughter and [knowing] first[-]degree murder is the mental state that accompanies the conduct resulting in the victim's death" and that whether the defendant acted knowingly or recklessly may be inferred from the circumstantial evidence surrounding the death).

¶ 53 "When a defendant elects to explain the circumstances of a crime, he is bound to tell a reasonable story or be judged by its improbabilities and inconsistencies." *People v. Nyberg*, 275 Ill. App. 3d 570, 579 (1995); see also *People v. Hart*, 214 Ill. 2d 490, 520 (2005). Here, the physical and circumstantial evidence presented at trial did not support the defendant's claim that Sharon's death was an accident. See *People v. Gross*, 166 Ill. App. 3d 413, 421 (1988). It rather overwhelmingly supported the jury's determination that he was guilty of knowing first-degree murder. We thus conclude that even assuming that the trial court abused its discretion in barring the statements at issue, the error was undoubtedly harmless.

¶ 54 Evidence of Prior Abuse

¶ 55 As noted, Sharon's brother, James, testified that approximately six months before Sharon's death, he had spoken with her, and she had a "black eye" and a small cut near the side of her mouth. Sharon's husband, Robert, testified that he had seen Sharon with bruises on her arms and face on one occasion after she had moved in with the defendant.

¶ 56 Prior to trial, the State filed a motion *in limine* requesting that it be allowed to introduce evidence of prior domestic violence between the defendant and Sharon and specifically named James and Robert as potential witnesses. The State's motion noted that James and Robert would both testify that Sharon had told them that the defendant had inflicted the injuries that they had observed. The motion argued that the proposed evidence was relevant to issues such as the defendant's intent and motive on the night that Sharon was killed.

¶ 57 At a subsequent hearing on the State's motion, defense counsel objected to the proffered evidence on grounds of hearsay, relevance, and reliability. The trial court indicated its agreement with counsel's hearsay objection, noting that because James and Robert had not personally witnessed the instances of alleged abuse, their claims that Sharon had told them the defendant had caused her injuries presented hearsay problems. The State did not subsequently request that the trial court determine whether Sharon's statements to James and Robert would be admissible under an exception to the hearsay rule. The trial court ultimately ruled that James and Robert would be permitted to testify as to what they had observed, even "though the relevancy may be questioned." The court

held that Sharon's statements to them would be barred as hearsay, however, "unless a further basis can be offered by the State."

¶ 58 On appeal, the defendant maintains that the trial court erred in allowing James and Robert to testify regarding what they had observed. The defendant asserts that he was prejudiced by the trial court's ruling because the jury was allowed to speculate that he had caused the injuries they described.

¶ 59 "Evidence that a defendant has committed crimes other than the one for which he is on trial may not be admitted for the purpose of demonstrating his propensity to commit crimes." *People v. Adkins*, 239 Ill. 2d 1, 22-23 (2010). "Such evidence, however, may be admitted for a proper purpose such as proving *modus operandi*, intent, identity, motive, or absence of mistake." *Id.* at 23. "However, before introducing evidence of other crimes, the State must meet the threshold requirement of showing that a crime took place and the defendant either committed it or participated in its commission." *People v. Barnes*, 2013 IL App (1st) 112873, ¶ 50. "It is not necessary to prove beyond a reasonable doubt that the defendant committed or participated in the crime, but there must be more than a mere suspicion regarding the defendant's involvement." *Id.* "The admissibility of other-crimes evidence is within the sound discretion of the trial court, and its decision on the matter will not be disturbed absent a clear abuse of that discretion." *People v. Dabbs*, 239 Ill. 2d 277, 284 (2010).

¶ 60 Here, the evidence before the trial court was that Sharon had told her brother and her husband that the defendant had inflicted the injuries that they had observed and that both instances of abuse had occurred during the time that Sharon had been living with the

defendant. We thus agree with the State that the evidence before the court went "well past a mere suspicion" that the defendant was responsible for the observed injuries. Nevertheless, because the State did not offer a basis upon which to admit Sharon's statements to James and Robert as an exception to the hearsay rule, the trial court rightfully precluded them from testifying as to what Sharon had told them. The trial court did not, however, abuse its discretion in allowing them to testify as to what they had observed. *Cf. People v. Thingvold*, 145 Ill. 2d 441, 456 (1991) ("[W]e agree with the appellate court that the State failed to connect [the] defendant to this stabbing and, consequently, this evidence should not have been admitted."); *Barnes*, 2013 IL App (1st) 112873, ¶ 57 (finding that the State had failed to "meet its threshold requirement of showing more than a mere suspicion" that the defendant had inflicted the victim's prior injury where numerous other individuals could have inflicted the injury and the injury could have resulted from nonviolent means). Furthermore, even assuming that the trial court should not have allowed James and Robert to testify, the error was harmless.

¶ 61 "Erroneous admission of other-crimes evidence calls for reversal only if the evidence was 'a material factor in the defendant's conviction such that, without the evidence, the verdict likely would have been different.' " *Adkins*, 239 Ill. 2d at 23 (quoting *People v. Hall*, 194 Ill. 2d 305, 339 (2000)). Here, whether the defendant had beaten and forcibly restrained Sharon before shooting her in the head on the night of February 14, 2004, was a salient issue at trial; whether he might have abused her on prior occasions was not. We also note that when cross-examined, Sharon's daughter, Nicole Tungett, who testified as the State's proof-of-life witness, acknowledged that she had

visited Sharon at the defendant's house on a regular basis and had lived there for a while, but she had never seen the defendant hit Sharon. Additionally, James and Robert were both impeached by defense counsel, *i.e.*, when cross-examined, James acknowledged that he had threatened to kill the defendant, and Robert acknowledged that his observations had occurred years prior to Sharon's death. Lastly, we reiterate that the evidence adduced at trial overwhelmingly supported the jury's finding that the defendant was guilty of first-degree murder and that Sharon's death was not an accident.

¶ 62 Closing Arguments

¶ 63 The defendant's final contention of error is that he was denied a fair trial by various remarks made by the State during its closing arguments to the jury. The defendant contends, among other things, that the State used its closing arguments to appeal to the jurors' emotions and improperly denigrate defense counsel. As previously noted, the defendant raises his closing-argument claim for the first time on appeal. As the State observes, the defendant has therefore forfeited the claim for purposes of appellate review (see *People v. Enoch*, 122 Ill. 2d 176, 186 (1988)), and he "cannot obtain relief unless he can carry his burden of establishing plain error." For the following reasons, we find that not only is the defendant unable to establish plain error, he has waived his opportunity to do so.

¶ 64 "The plain-error rule bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). "The plain-error doctrine is a narrow and limited exception." *People v. Hillier*, 237 Ill. 2d 539, 545 (2010).

> "[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

"A defendant seeking plain-error review has the burden of persuasion to show the underlying forfeiture should be excused." *People v. Johnson*, 238 Ill. 2d 478, 485 (2010). "A defendant who fails to argue for plain-error review obviously cannot meet his burden of persuasion." *Hillier*, 237 Ill. 2d at 545.

¶ 65 Here, perhaps as a matter of strategy, the defendant does not argue in his opening brief that either of the two prongs of the plain-error doctrine are satisfied in the present case. In fact, the words "plain error" appear only once in his opening brief, when referenced in a string citation. The defendant has thus failed to sufficiently develop an argument that plain error should apply here. See *People v. Nieves*, 192 Ill. 2d 487, 503 (2000); *People v. Pace*, 2015 IL App (1st) 110415, ¶ 76; *In re Commitment of Hooker*, 2012 IL App (2d) 101007, ¶ 83; *People v. Hampton*, 387 Ill. App. 3d 206, 220 (2008). "[W]hen a defendant fails to present an argument on how either of the two prongs of the plain-error doctrine is satisfied, he forfeits plain-error review." *Hillier*, 237 Ill. 2d at 545-46. That the State addresses the defendant's argument on appeal as if the defendant had argued for plain-error review does not alter our conclusion, nor does the fact that the

defendant asserts in his reply brief that he is seeking plain-error review. See *People v. Polk*, 2014 IL App (1st) 122017, ¶¶ 49-50. It is well-established that points not argued in an appellant's opening brief are waived and cannot be raised for the first time in the appellant's reply brief. See *id.* ¶ 49 (citing Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013)). We therefore conclude that the defendant has forfeited plain-error review of his claim that the State's closing arguments denied him a fair trial. Moreover, forfeiture aside, we reject the defendant's claim that the State's closing arguments warrant a reversal of his conviction.

¶ 66 "Prosecutors are afforded wide latitude in closing argument." *People v. Alvine*, 173 Ill. 2d 273, 292 (1996). "The entire record, particularly the full argument of both sides, must be considered on a case-by-case basis to assess the propriety of prosecutorial comment." *People v. Williams*, 313 Ill. App. 3d 849, 863 (2000). A prosecutor's comments must also be considered in context, "rather than focusing on selected phrases or remarks." *People v. Runge*, 234 Ill. 2d 68, 142 (2009). Ultimately, "a prosecutor's comments in closing argument will result in reversible error only when they engender 'substantial prejudice' against the defendant to the extent that it is impossible to determine whether the verdict of the jury was caused by the comments or the evidence." *People v. Macri*, 185 Ill. 2d 1, 62 (1998).

¶ 67 Here, we agree with the State that most of the comments complained of on appeal did not exceed the bounds of permissible argument and that the defendant's contrary claims are largely based on remarks taken out of context and cases that are easily distinguishable. See, *e.g.*, *People v. Kirchner*, 194 Ill. 2d 502, 551 (2000) (holding that

the State's brief remarks directed at the defendant's theory of defense were not "direct references to defense counsel and repeated accusations of deceit" and that the defendant's cited cases were thus distinguishable); *People v. Richardson*, 123 Ill. 2d 322, 356 (1988) (noting that "the credibility of witnesses is a proper subject for closing argument" and that "a defendant may not claim prejudice from comments by the prosecutor when those comments were invited by [the] defendant's argument"). We further agree that while some of the prosecutor's comments were improper, none rise to the level of reversible error. See, *e.g.*, *People v. Jones*, 2011 IL App (1st) 092529, ¶¶ 41-42 (holding that even if State's remarks imploring that "the jury give the victim and his family justice" were improper under the circumstances, they were not a material factor in the defendant's conviction). Additionally, the remarks in question "were brief and isolated in the context of lengthy closing arguments." *Runge*, 234 Ill. 2d at 142.

¶ 68 We also note that during the defendant's closing argument, defense counsel specifically addressed many of the comments that the defendant complains of on appeal. Counsel also accused the State of trying to "inflame" the jurors so that they would decide the case based on their emotions rather than the facts. The jury was subsequently instructed that it should not be influenced by sympathy. Both before and after the parties' closing arguments, the jury was also instructed that the arguments were not evidence and that comments not based on evidence should not be considered.

¶ 69 We also note that the record on appeal indicates that the defendant's trial was, as the trial court stated, "quite an emotional and very disturbing" one. When defense counsel asked the court to admonish the prosecutor "that she not cry or have tears" during

her closing arguments, counsel's request was denied. The arguments made at the close of the trial reflected the parties' respective theories of the case, and the record indicates that the arguments were zealously presented. Notably, defense counsel, who was unquestionably competent, did not object to any portion of the State's closing arguments. Moreover, in the defendant's motion for a new trial, counsel raised numerous claims of error but did not contend that the State's arguments had denied the defendant a fair trial. Lastly, we again emphasize that the evidence adduced at trial overwhelmingly supported the jury's finding that the defendant was guilty of first-degree murder rather than involuntary manslaughter. Under the circumstances, any possible prejudice that might have resulted from the State's closing arguments was harmless, as it cannot be said that the jury's verdict "was caused by the comments" rather than the evidence that was presented for its consideration. *Macri*, 185 Ill. 2d at 62; see also *People v. Smith*, 152 Ill. 2d 229, 268 (1992) ("This court has specifically ruled that a prosecutor's remarks do not require reversal if the State's evidence of guilt was 'substantial' rather than closely balanced."); *People v. Gonzalez*, 247 Ill. App. 3d 370, 375 (1993) ("The evidence presented in the instant case was not closely balanced and was clearly sufficient to support a guilty verdict in the absence of the prosecutor's improper argument.").

¶ 70 CONCLUSION

¶ 71 For the foregoing reasons, we conclude that the defendant was not denied a fair trial. Accordingly, his conviction for first-degree murder is hereby affirmed.

¶ 72 Affirmed.

¶ 73 JUSTICE CATES, specially concurring:

¶ 74 I concur in much of the majority's reasoning, but write this special concurrence because I believe the trial court erred when it allowed Sharon's brother, James, and Sharon's husband, Robert, to testify. The testimony given by James indicated that approximately six months prior to Sharon's death, he had spoken with Sharon, and she had a "black eye" and a small cut near the side of her mouth. No explanation was allowed to be given, and the only conclusion that is plausible by allowing such testimony is that the defendant was the person responsible for inflicting these injuries.

¶ 75 The testimony given by Robert is equally damaging. Robert testified that he saw Sharon with bruises on her arms and face on one occasion after Sharon had moved in with the defendant. Again, without any further explanation, the jury had to conclude that these injuries were caused by the defendant.

¶ 76 In my view, this testimony should not have been allowed, and the trial court erred in permitting these witnesses to so testify. This error, however, does not mean that a new trial is warranted. As clearly set forth by the majority, the "[e]rroneous admission of other-crimes evidence calls for reversal only if the evidence was 'a material factor in the defendant's conviction such that, without the evidence, the verdict likely would have been different.' " *Adkins*, 239 Ill. 2d at 23 (quoting *Hall*, 194 Ill. 2d at 339). In this case, the evidence was so overwhelming that it is highly unlikely, if not improbable, that the admission of this other-crimes evidence would have swayed the jury toward an acquittal. Indeed, I believe the jury would have convicted the defendant with, or without, this evidence.

¶ 77 Therefore, I agree with the majority that the defendant's conviction for first-degree murder should be affirmed.