2016 IL App (5th) 140107-U

NO. 5-14-0107



IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS, | ) | Appeal from the |
| | ) | Circuit Court of |
| Plaintiff-Appellee, | ) | St. Clair County. |
| | ) | |
| v. | ) | No. 12-CF-724 |
| | ) | |
| DOUGLAS NEUMEYER, | ) | Honorable |
| | ) | Zina R. Cruse, |
| Defendant-Appellant. | ) | Judge, presiding. |

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JUSTICE CHAPMAN delivered the judgment of the court.
Justices Welch and Goldenhersh concurred in the judgment.

**ORDER**

¶ 1 *Held*: Where a witness's testimony did not amount to improper opinion testimony, the conviction is affirmed. Although in closing arguments the assistant State's Attorney did not argue that the jury needed to consider the mental state for domestic battery, the jury was properly instructed and therefore the defendant was not denied a fair trial. The trial court's supplemental instruction to the jury was not improper and did not deprive the defendant of a fair trial.

¶ 2 The defendant was convicted of domestic battery and was sentenced to 24 months of probation. He directly appeals to this court raising three issues about the propriety of the following: testimony of a police officer about the nature of injuries to the defendant and to the victim; the assistant State's Attorney's closing argument that omitted the mental

state necessary to convict the defendant of domestic battery; and court admonishments to the jury in lieu of a *Prim* instruction. We affirm.

¶ 3 FACTS

¶ 4 On May 15, 2012, the State charged the defendant with domestic battery in that he punched Shelly, a member of his household, in the face. The charge was labeled as a subsequent offense because he had been previously convicted of a misdemeanor domestic battery on February 1, 2012. The criminal information was amended on August 2, 2013.

¶ 5 On August 5, 2013, the case against the defendant was tried before a jury. Four witnesses testified at trial: Shelly Crotty, Officer Kevin Tisch, the defendant, and the defendant's mother, Marilyn Neumeyer.

¶ 6 Shelly testified that on the date of the incident, the defendant was a member of a wedding party, and that she also attended the wedding, and then the subsequent reception. She admitted that during the reception, she consumed approximately three alcoholic beverages from 6 p.m. until about midnight. They left the reception because the defendant kept falling, and got into an argument with the bartenders who refused to serve him more alcohol. The bartenders advised that if they did not leave the reception, they would be forced to call the police.

¶ 7 Shelly drove the defendant to their home. Her plan was to drop him off so that he could go to bed, and then she would drive to her mother's home to pick up their son. But, the defendant would not get out of the car, and Shelly testified that he became argumentative and accused her of cheating on him. She reached across the defendant, opened his door, and told him to get out of the car. The defendant fell out of the car onto

the gravel driveway. Shelly threw the house keys out of the car. She closed his car door in preparation to leave, but testified that she did not do so right away because she was uncertain about whether part of his body was under the car. Because the defendant was not getting up, Shelly exited the car and walked around to the other side. She helped to get him up and off of the ground. Once the defendant was standing, he punched Shelly on the right side of her face with a fist. He punched her with enough force to knock her to the ground, and she landed on her buttocks. After she was on the ground, Shelly testified that the defendant kept trying to get on top of her to hit her more. She kicked out at him in order to get him off of her. Although she continued to kick him, the defendant did not fall down. Eventually, he reopened the car door, removed his tux jacket and her mobile phone, and went into their home. Shelly testified that she did not hit or threaten the defendant at any time during the altercation.

¶ 8 Shelly testified that she then left their home and drove to the defendant's mother's home. She informed his mother of what had happened and explained that she was heading to pick up their son. Shelly advised the defendant's mother that she needed to go remove the defendant from their home before she returned home with their son, or Shelly would call the police. Shelly drove to her mother's home, picked up their son, and drove home. She testified that she did not want to call the police because she loved the defendant and was fearful that he would be taken to jail. However, she testified that because he had struck her that evening, if he was still at the home upon her return, she would have called the police. Upon arrival at their home, the police were there. Shelly spoke with the police that night.

¶ 9 The police took photographs of her face to depict the swelling. Approximately 36 hours later, she returned to the Swansea police department in order to have photographs of the bruises on her buttocks and back taken. She testified that she did not seek any medical treatment for her injuries, but that her cheek was red and swollen and that her jaw hurt for several months.

¶ 10 Officer Kevin Tisch testified that he is employed as a police officer with the Village of Swansea. On May 13, 2012, he was on duty, and testified that an emergency services call came into the dispatch that a male subject needed an ambulance and claimed that he had been battered by his girlfriend. When he arrived, the defendant was out in the front yard and was talking with his sergeant and another officer. The emergency services personnel checked the defendant's injuries, but ultimately the defendant decided not to go to the hospital. The defendant told Officer Tisch that he and his girlfriend had been at a wedding, and that they argued about cheating. The defendant explained that she was slapping him as they walked up towards the front door of their home, and then he was struck in the head by an object. Officer Tisch searched for this object, but nothing was found. As they spoke, Officer Tisch noted that the defendant was intoxicated. He had the odor of alcoholic beverages on his clothing and on his breath, and the defendant had difficulty walking and speaking. At some point, Shelly arrived back at the home. Officer Tisch testified that Shelly was distraught, but that she appeared to be sober. Based upon his interviews with both the defendant and Shelly, Officer Tisch arrested the defendant.

¶ 11 Officer Tisch testified that Shelly had an injury to the right side of her face that was swollen and red. He testified that the defendant had abrasions to the right side of his

face, as well as to the temple area. The area of the defendant's abrasions contained gray dust and small pebbles. Photographs of their injuries were taken that evening. Officer Tisch testified that the injury to Shelly's face was consistent with being struck in the face. Conversely, Officer Tisch testified that based upon his work experience and the fact that the defendant had gray dust and pebbles in and around his facial wounds, he did not believe that the defendant had been struck in the face. He testified that the defendant's injuries were consistent with being scratched or the result of contact with the gravel driveway.

¶ 12 The defendant testified in his own defense at trial. He testified that his girlfriend Shelly was upset with him on the day of the wedding because he had told her that she could not ride the party bus from the church to the reception, but that he later learned that he was mistaken and she could have been on the bus with him. At the reception, he noted that she was drinking whiskey on ice and was not participating in any of the typical reception events. The defendant acknowledges that he consumed alcoholic beverages while on the party bus and while at the wedding reception. However, he testified that they left the reception because "[i]t was time to go." On cross-examination, he admitted that he was asked to leave the reception because of his intoxication. Upon arrival at their home, the defendant described the events in a markedly different way than Shelly had. He testified that Shelly began yelling at him; that she opened up the passenger door of the vehicle and pushed him out; that she exited the car and attempted to help him up, but in doing so, she also fell to the ground; that she continued to slap him as they walked towards the front door; that she threw the house keys at him; and that she then left. He

testified that she was hitting him in part because she was attempting to regain her mobile phone from him. The defendant denied striking Shelly in the face, and further testified that if he was on top of her it was an unintentional consequence of the two of them falling down together. On cross-examination, the defendant testified that Shelly caused his wounds near his ear by pushing him out of the vehicle. He admitted, however, that he never told Officer Tisch that he was pushed out of the vehicle. The defendant stated that he was bleeding, and testified that because he did not have a mobile phone, he went to a neighbor's house. The neighbor was an emergency services worker, and the neighbor called for an ambulance.

¶ 13 The defendant's mother, Marilyn Neumeyer, testified about her knowledge of the events of the night her son was arrested. She and Shelly drove together to the wedding. Marilyn testified that she knew Shelly was upset about something. Later at the reception, she testified that Shelly was consuming alcoholic beverages and was not participating in typical wedding reception events. Later that evening, she came to Marilyn's home. Marilyn testified that Shelly was very upset and was yelling that she needed to get the defendant out of the house or she would contact the police. She testified that she did not notice any abrasions, redness, bruising, or bleeding on Shelly's face. However, Marilyn noticed the bruising on Shelly's face when Shelly allegedly came to her house a second time.

¶ 14 After closing arguments and instructions to the jury on the second day of trial, the jury began deliberating at 9:35 a.m. At 10:44 a.m., the jury sent out the following statement and question to the court: "We feel we are a hung jury[.] Can we declare we

are hung?" The trial judge stated that she was "not inclined to declare a hung jury this early." The judge told the parties and their attorneys that she wanted to ask the jury if they were confused about how to deliberate, and that she may also mention that they should review the instructions and pay close attention to the propositions–to take each proposition separately. Both attorneys agreed with this approach. The attorney for the State asked the judge if she was planning to give the jury the *Prim* instruction. The judge said that she would only do so if one of the parties asked for that instruction. The defendant's attorney stated: "I don't think it's appropriate at this point."

¶ 15 The jury foreperson indicated that some of the jurors were having doubts. The judge asked if they had reviewed the instruction containing the two elements of the crime. The foreperson stated that she did not specifically remember that instruction. The judge then addressed the jury noting that the jurors swore an oath to render a verdict; she was not going to declare a hung jury at that time; she suggested that they review the propositions instruction; and she asked the jurors to continue to discuss the case and to use the very thorough instructions for guidance. At 1:50 p.m., the jury returned to the courtroom with a guilty verdict.

¶ 16 The defendant was sentenced on September 30, 2013, to 30 months' probation with the first six months as intensive probation. On February 10, 2014, the trial court terminated the intensive probation but upheld the remaining terms of the sentence.

¶ 17 The defendant appeals and asks this court to reverse his conviction because Officer Tisch provided improper opinion testimony about the nature of his and Shelly's injuries. He also argues that the State denied him of his right to a fair trial because the

assistant State's Attorney made misleading comments in closing arguments about the knowledge element of domestic battery. Finally, the defendant contends that the trial court's supplemental instruction coerced the jury and denied him a fair trial.

¶ 18 LAW AND ANALYSIS

¶ 19 Testimony of Officer Tisch

¶ 20 There is no dispute that Officer Tisch provided lay witness opinion testimony regarding the probable source of the defendant's and Shelly Crotty's injuries. The defendant argues that because he was the investigating police officer, his testimony added credibility to Shelly's version of the events. There is also no dispute that the defendant's attorney did not object to this testimony when elicited by the assistant State's Attorney. The defendant argues that his attorney's failure to object amounted to either plain error or was ineffective assistance of counsel. We disagree with the defendant's arguments and conclude that Officer Tisch's lay witness opinion testimony was permissible.

¶ 21 The defendant asks us to consider this issue either as plain error or alternatively that his attorney was ineffective for failure to object. See *People v. Herron*, 215 Ill. 2d 167, 175-80, 830 N.E.2d 467, 473-76 (2005) (first prong of plain error test); *People v. Wilcox*, 407 Ill. App. 3d 151, 166, 941 N.E.2d 461, 474-75 (2010) (second prong of plain error test); *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (ineffective assistance of counsel); *People v. Albanese*, 104 Ill. 2d 504, 525, 473 N.E.2d 1246, 1255 (1984) (ineffective assistance of counsel).

¶ 22 Typically, if a defendant raises an issue for the first time on appeal, we consider the argument to be waived. *People v. Johnson*, 238 Ill. 2d 478, 484, 939 N.E.2d 475, 479

(2010). If the defendant is able to satisfy the plain error standard, then relief can be awarded. *Id.* at 484, 939 N.E.2d at 479-80. The defendant must first establish that an error has occurred. *Id.* The defendant must also establish that either "the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant," or that "[the] error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." (Internal quotation marks omitted.) *Id.* The defendant bears the burden to prove these elements. *People v. Hillier*, 237 Ill. 2d 539, 545, 931 N.E.2d 1184, 1187-88 (2010).

¶ 23 The defendant correctly argues that in a general sense, "an opinion or conclusion of a nonexpert witness may not be admitted into evidence, and his testimony must be confined to a report of the facts." *City of Evanston v. City of Chicago*, 279 Ill. App. 3d 255, 269, 664 N.E.2d 291, 301 (1996). However, if the proper foundation for lay witness opinion testimony is adduced, then this type of testimony can be permissible.

¶ 24 Rule 701 of the Illinois Rules of Evidence provides as follows:

> "If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are (a) rationally based on the perception of the witness, and (b) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue, and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702 [Testimony by Experts]." Ill. R. Evid. 701 (eff. Jan. 1, 2011).

For foundation, the witness must establish personal knowledge of the facts that form the basis of his opinion. *People v. Jones*, 241 Ill. App. 3d 228, 232, 608 N.E.2d 953, 956

(1993) (citing M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 701.1, at 482-83 (5th ed. 1990)). "The opinion must also be one that a person could normally form from observed facts." *Id.* The testimony at issue must be based on "concrete facts perceived from the witness's own senses, and cannot be based on the statements of others." M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 701.1, at 573 (9th ed. 2009). Finally, the opinion can only be introduced "if helpful to a clear understanding of his testimony or the determination of a fact in issue." *Jones*, 241 Ill. App. 3d at 232, 608 N.E.2d at 956 (citing M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 701.1, at 482-83). Additionally, opinion testimony of this type involves what the witness "thinks, believes, or infers in regard to facts in dispute, as distinguished from his personal knowledge of the facts themselves." (Internal quotation marks omitted.) M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 700.1, at 570 (9th ed. 2009) (quoting *Mittelman v. Witous*, 135 Ill. 2d 220, 243, 552 N.E.2d 973, 984 (1989), *abrogated on other grounds by Kuwik v. Starmark Star Marketing & Administration, Inc.*, 156 Ill. 2d 16, 619 N.E.2d 129 (1993) (quoting Black's Law Dictionary 985 (5th ed. 1979))).

¶ 25 In this case, both the defendant and Shelly claimed to have been battered, and both had obvious injuries. Upon looking at Shelly's face, Officer Tisch noted that her injuries were consistent with having been struck in the face, as she alleged. Then the assistant State's Attorney asked Officer Tisch if it appeared that the defendant had been struck in the face. Officer Tisch responded, "From the injuries, no." When asked why he answered in the negative, Officer Tisch stated:

"A. From my experience through years of law enforcement, the injury was not consistent with other calls I've had where you've either been punched or hit in the face or on your body, it appeared to me more as scratches from an object or something.

Q. Is that because of the dust and the debris that was on the defendant's face?

A. That as well."

Officer Tisch was providing his lay opinion from his personal experience and perspective. He did not provide any technical, forensic, or other type of expert testimony. He provided no factual opinion on whether the defendant struck Shelly or whether Shelly struck the defendant. He provided no opinion as to the credibility of the defendant or Shelly. Officer Tisch provided his present-sense commentary on his personal observations. The fact that the defendant was covered with dust and had bits of gravel in the wounds on his face was consistent with his falling on the gravel driveway. The defendant himself testified that he fell onto the gravel driveway twice, and thus Officer Tisch's statement was consistent with the defendant's own testimony. At no time did the assistant State's Attorney ask Officer Tisch how he decided to arrest the defendant rather than Shelly Crotty. At no time did the assistant State's Attorney ask Officer Tisch who he believed was telling the truth. The jury was free to analyze the facts of the case, evaluate the testimony and the evidence provided by all witnesses, and make its decision.

¶ 26 The defendant contends that Officer Tisch's testimony was essentially that of an expert witness. We disagree. There are situations in which police officers, who have

special training and experience, are able to provide general opinion testimony that does not invade expert witness territory. See, *e.g.*, *People v. Stokes*, 95 Ill. App. 3d 62, 66-67, 419 N.E.2d 1181, 1185-86 (1981) (where a police officer's general opinion testimony as to the trajectory of a gunshot was deemed permissible); *People v. Lloyd*, 178 Ill. App. 66, 71 (1913) (where a police officer's opinion testimony as to a motor vehicle driver's rate of speed was permissible). We conclude that Officer Tisch's statements regarding the nature of the injuries and consistency with being struck or not being struck are permissible opinions and do not enter the realm of expert testimony.

¶ 27 Because we conclude that Officer Tisch's testimony was permissible, we do not find any error. Additionally, we find that there is no basis by which the defendant's attorney could have been ineffective for failing to object.

¶ 28 Closing Arguments by the State

¶ 29 The defendant next argues that he was denied a fair trial because the assistant State's Attorney misstated the law in closing argument. In closing, the assistant State's Attorney argued that the State only needed to prove that Shelly was a member of the defendant's household and that the defendant "made physical contact of an insulting or provoking nature with Shelly Crotty." We have reviewed the record, and agree that during closing argument, the assistant State's Attorney did not mention the required mental state for a domestic battery conviction. The record also reflects that the defendant's attorney did not object to this omission. In rebuttal, the assistant State's Attorney included the mental state, arguing that the State had to prove that the defendant "knowingly and intentionally *** commit[ed] a battery."

¶ 30 As the State noted, the defendant failed to object to any of the allegedly inappropriate remarks, and thus the issue is forfeited. *People v. Herron*, 215 Ill. 2d 167, 175, 830 N.E.2d 467, 472 (2005). As the defendant asks us to consider this issue despite the lack of objection, he contends that prosecutorial misconduct in closing arguments can be considered plain error. See *People v. Young*, 33 Ill. App. 3d 443, 445-47, 337 N.E.2d 40, 41-43 (1975); *People v. Slaughter*, 84 Ill. App. 3d 88, 94, 404 N.E.2d 1058, 1063 (1980); *People v. Morgan*, 20 Ill. 2d 437, 441-42, 170 N.E.2d 529, 531 (1960). Alternatively, he argues that his attorney was ineffective for failing to object. *Strickland*, 466 U.S. at 687; *Albanese*, 104 Ill. 2d at 525, 473 N.E.2d at 1255.

¶ 31 In general, prosecutors are allowed great latitude in closing arguments. *People v. Kitchen*, 159 Ill. 2d 1, 38-39, 636 N.E.2d 433, 450 (1994). Improper remarks made in closing do not automatically warrant a reversal of the conviction unless the remarks result in substantial prejudice to the defendant. *People v. Nicholas*, 218 Ill. 2d 104, 121, 842 N.E.2d 674, 685 (2005). Reversal because of substantial prejudice is appropriate only if the prosecutor's comments constituted a material factor in the defendant's conviction. *People v. Wheeler*, 226 Ill. 2d 92, 123, 871 N.E.2d 728, 745 (2007); *People v. Fields*, 322 Ill. App. 3d 1029, 1036, 751 N.E.2d 97, 103 (2001). Additionally, closing arguments must be reviewed in their entirety–both the arguments of the prosecutor and of defense counsel. *People v. Rush*, 294 Ill. App. 3d 334, 340, 689 N.E.2d 669, 674 (1998); *People v. Land*, 2011 IL App (1st) 101048, ¶ 153, 955 N.E.2d 538 (quoting *Wheeler*, 226 Ill. 2d at 123, 871 N.E.2d at 745).

¶ 32 The defendant correctly states that it is well-settled that a prosecutor is not allowed to misstate the law in closing argument. See *People v. Ramsey*, 239 Ill. 2d 342, 441, 942 N.E.2d 1168, 1222-23 (2010). The defendant cites several cases in support of his argument that the prosecutorial omissions mandate reversal. We find that these cases are all distinguishable. All three cases involve arguments with direct misstatements of the law as opposed to what happened in this case–an omission of a required element of proof. See *People v. Buckley*, 282 Ill. App. 3d 81, 89-90, 668 N.E.2d 1082, 1088 (1996) (in arguing the recklessness element of involuntary manslaughter, the prosecutor repeatedly and incorrectly argued that carelessness was the same as recklessness); *People v. McCoy*, 378 Ill. App. 3d 954, 965-66, 881 N.E.2d 621, 632-33 (2008) (prosecutor incorrectly argued that the defendant was guilty of resisting arrest by merely arguing with the police officer); *People v. Gutirrez*, 205 Ill. App. 3d 231, 264-65, 564 N.E.2d 850, 872 (1990) (prosecutor affirmatively misled the jury about the distinction between recklessness and an accident in the context of an involuntary manslaughter prosecution).

¶ 33 In contrast to these cases, this assistant State's Attorney simply failed to mention the *mens rea* required for domestic battery. In *People v. Hunley*, 189 Ill. App. 3d 24, 44, 545 N.E.2d 188, 201 (1989), the prosecutor failed to inform the jury that the State also had to prove *mens rea* of intent in a murder case. On appeal, the court found that this omission did not result in reversible error, because the jury was properly instructed on the elements of the offense. *Id.*

¶ 34 As the State argues, a proper jury instruction mitigates any harm that could have been caused by an improper closing argument due to a misstatement of the law or an

omission. *People v. Lawler*, 142 Ill. 2d 548, 564-65, 568 N.E.2d 895, 902-03 (1991). Counsel's arguments are construed as carrying less weight with the jury than instructions do. *Id.*

¶ 35 We have reviewed the instructions given to the jury in this case and conclude that the jury was properly instructed on the elements of domestic battery. The jury was instructed on the "knowing" mental state required for a finding of guilt, and was additionally instructed with the definition of the mental state element. Furthermore, the trial court instructed the jury that only the court was responsible for instructing the jury on the law. Finally, in rebuttal argument, the assistant State's Attorney corrected its previous omission and set out the requisite mental state for domestic battery. Thus, when viewed in its entirety, the State's closing argument set out the proper elements for conviction.

¶ 36 We find that the assistant State's Attorney's earlier omission of the "knowing" requirement for domestic battery did not substantially prejudice the defendant, and therefore the omission does not warrant the reversal of his conviction.

¶ 37 Because we find that the defendant was not prejudiced by the initial omission of the *mens rea* element of the crime in closing argument, we find no error and further conclude that the defendant's claim that his attorney was ineffective is meritless.

¶ 38 Instruction to the Jury

¶ 39 The defendant finally argues that the instruction given to the jury by the trial judge after the foreperson inquired if they could be a "hung jury," was improper, coerced a verdict, and denied the defendant a fair trial. The defendant is correct that hung juries

can be "an inevitable by-product of a unanimous-verdict requirement, and the jury cannot be compelled to reach a verdict in all instances." *People v. Gregory*, 184 Ill. App. 3d 676, 681, 540 N.E.2d 854, 857 (1989). However, based upon applicable law and the facts of this case, we disagree with the defendant that the trial judge coerced a verdict in this case.

¶ 40 In the case of *People v. Prim*, 53 Ill. 2d 62, 289 N.E.2d 601 (1972), the Illinois Supreme Court addressed the issue of what a trial judge should do when a jury indicates that it may be deadlocked and unable to reach a verdict. The Illinois Supreme Court noted that providing additional instruction to a jury has possible coercive effects. *Id.* at 74, 289 N.E.2d at 608. However, the court stated that, "[j]urors, and especially those voting in the minority, conceivably could feel a coercive influence if when seeking guidance from the court they are met with stony silence and sent back to the jury room for further deliberation." *Id.* The *Prim* court then developed a model instruction with the purpose of addressing the coercive effect concerns. *Id.* at 75-76, 289 N.E.2d at 609.

¶ 41 The Illinois Pattern Jury Instructions has its own *Prim*-based instruction:

> "The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree thereto. Your verdict must be unanimous.
>
> It is your duty, as jurors, to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but do so only after an impartial consideration of the evidence with your fellow jurors. In the course of

your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

You are not partisans. You are judges–judges of the facts. Your sole interest is to ascertain the truth from the evidence in the case." Illinois Pattern Jury Instructions, Criminal, No. 26.07 (4th ed. 2000).

This instruction is designed to urge continued deliberations but addresses the possibility that continued deliberations may not result in a unanimous verdict.

¶ 42 Here, after one hour of deliberations, the jury sent the note to the trial judge inquiring about whether the jury could be a "hung jury." In response, the trial judge met with the assistant State's Attorney and the defendant's attorney about how to handle the situation. The trial judge indicated that it was too soon in her opinion to declare the jury deadlocked. The assistant State's Attorney asked the judge if she was going to give the jury the *Prim* instruction. Defense counsel spoke up and stated that, "I don't think it's appropriate at this point." The judge discussed her plan with the attorneys, indicating that she wanted to ask the jurors if they were confused about how to go about deliberations and, more specifically, if they had considered the instructions containing the elements of the crime. Not only did the defendant's attorney fail to object to this approach, but she agreed with the trial court's suggestion.

¶ 43 Consequently, because the defendant's attorney agreed to the trial court's approach, he asks this court to review the issue on a plain error basis, or alternatively on

the basis that his attorney was ineffective. See *Herron*, 215 Ill. 2d at 175-80, 830 N.E.2d at 473-76; *Wilcox*, 407 Ill. App. 3d at 166, 941 N.E.2d at 474-75; *Strickland*, 466 U.S. at 687; *Albanese*, 104 Ill. 2d at 525, 473 N.E.2d at 1255.

¶ 44 We find that the defendant is not able to pursue this issue on a plain error basis because any error was invited by his attorney's acquiescence to the trial court's plan. In *People v. Curry*, 2013 IL App (4th) 120724, ¶ 87, 990 N.E.2d 1269, the defendant alleged on appeal that the trial court erred by not giving a *Prim* instruction. Defense counsel acquiesced to the trial court's plan to simply instruct the jury to continue its deliberations. *Id.* ¶ 88. Because defense counsel agreed to the instruction, the defendant could not object on appeal. *Id.* "The doctrine of invited error prohibits a defendant from requesting to proceed in one manner and then later contending on appeal that the course of action was in error." *Id.* (citing *People v. Carter*, 208 Ill. 2d 309, 319, 802 N.E.2d 1185, 1190 (2003)).

¶ 45 However, while the defendant cannot object on a plain error basis, he is able to present his claim for ineffective assistance of counsel. *People v. Bowens*, 407 Ill. App. 3d 1094, 1101, 943 N.E.2d 1249, 1258 (2011).

¶ 46 To prevail on an ineffective-assistance-of-counsel claim, the defendant has to show both that his attorney's performance was deficient, and that he suffered prejudice as a result of the deficient performance. *Strickland*, 466 U.S. at 687. Counsel's performance must be objectively unreasonable and "but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Lefler*, 294 Ill. App. 3d 305, 311, 689 N.E.2d 1209, 1214 (1998) (citing *Strickland*, 466 U.S. at 694).

There is a very strong presumption that counsel's questioned conduct was within the range of reasonable professional assistance. *Strickland*, 466 U.S. at 689. The defendant bears the burden to overcome this presumption. *Id.*

¶ 47 Before we can reach the issue of whether the defendant's attorney was ineffective, we must first examine the trial judge's instruction to determine if the instruction was erroneous. If the instruction was improper, then we will consider whether the defendant's attorney's performance was defective. In speaking with the foreperson about whether or not the jurors had specifically contemplated the elements of the crime and whether or not the evidence did or did not support a conviction, it became clear that the jurors had not likely reviewed the instructions. At this point, the jurors had only been in deliberations for approximately one hour. In response to the foreperson's answer to her question, the judge verbally instructed the jury as follows:

> "You took an oath, ladies and gentlemen, and in the oath you swore or affirmed to render a verdict, and that is what we need you to do. I do appreciate that you find yourself at a crossroad, and I am not at this point going to declare a hung jury, what I'm going to do is order you to go back into the jury room, to discuss this matter further, perhaps take a look at that instruction, and read it and follow it. It tells you exactly what you need to do. Look at the first proposition, address it. Look at the second proposition, if you get to that point, and address it. Continue to talk about it. Refer back to those instructions, they're very thorough, and if you read them, you will probably find some guidance on what it is you need to do to get to the next step and to get a unanimous verdict."

¶ 48 A trial judge's comments to a jury can be improper if, under the totality of the circumstances, the language chosen by the judge "actually interfered with the jury's deliberations and coerced a guilty verdict." *Wilcox*, 407 Ill. App. 3d at 163, 941 N.E.2d at 472 (citing *People v. Fields*, 285 Ill. App. 3d 1020, 1029, 675 N.E.2d 180, 186 (1996)). The difficulty in assessing whether or not a judge's comments served to coerce the jury stems from the subjective nature of coercion. *Id.*; *Gregory*, 184 Ill. App. 3d at 681-82, 540 N.E.2d at 857 (citing *People v. Branch*, 123 Ill. App. 3d 245, 251, 462 N.E.2d 868, 873 (1984)). Therefore, "the test effectively turns on a consideration of whether the court's instruction imposed such confusion or pressure on the jury to reach a verdict that the accuracy and integrity of the verdict returned becomes uncertain." *Gregory*, 184 Ill. App. 3d at 682, 540 N.E.2d at 857 (citing *Branch*, 123 Ill. App. 3d at 251, 462 N.E.2d at 873). More specifically, we must determine if the judge's comments caused the minority jurors to defer to the conclusions of the majority jurors. *Wilcox*, 407 Ill. App. 3d at 163, 941 N.E.2d at 472. The length of jury deliberations following the judge's comments is insufficient alone to serve as proof that the verdict was the product of coercion. *Gregory*, 184 Ill. App. 3d at 682, 540 N.E.2d at 857-58; *Wilcox*, 407 Ill. App. 3d at 163, 941 N.E.2d at 472. However, brief deliberations provide an inference of juror coercion. *Wilcox*, 407 Ill. App. 3d at 163, 941 N.E.2d at 472 (citing *People v. Ferro*, 195 Ill. App. 3d 282, 292, 551 N.E.2d 1378, 1386 (1990)).

¶ 49 Here, the trial judge reminded the jurors of their oath, but then followed that with the statement that "I am not at this point going to declare a hung jury ***." This qualification of time distinguishes this case from other cases where the trial judge's

comments to the jury were declared erroneous. With this comment, the trial judge communicated that the possibility of declaring a hung jury remained. Further on in her comments, the judge also noted that they should look at the second proposition "if you get to that point," which also opens up the possibility of the jury remaining deadlocked or acquitting the defendant.

¶ 50 The defendant cites to *People v. Wilcox* and *People v. Gregory* as support for his argument that the comments to the jury were erroneous. We find both cases distinguishable. In *People v. Wilcox*, the trial judge's comments gave the impression that being deadlocked was not permissible: " '[w]hen you were sworn in as jurors and placed under oath you pledged to obtain a verdict. Please continue to deliberate and obtain a verdict.' " *Wilcox*, 407 Ill. App. 3d at 163, 941 N.E.2d at 472. Less than 40 minutes later, the jury returned a guilty verdict on the charges of first-degree murder and aggravated unlawful restraint. *Id.* at 163, 941 N.E.2d at 473. In *People v. Gregory*, there was confusion with the verdict forms, in that the jury returned a unanimous verdict on the charge of criminal trespass to a motor vehicle, but a 10-2 verdict on the charge of burglary. In response, the trial judge stated:

> " 'Ladies and Gentlemen of the Jury, as the instructions I have previously given you indicate, your verdict upon any charge must be unanimous. So, with that I'm going to return these forms, and ask you to continue your deliberations, and with that I'd ask you to retire again.' " *Gregory*, 184 Ill. App. 3d at 679, 540 N.E.2d at 856.

Within the hour, the jury returned with guilty verdicts on both charges. *Id.* at 680, 540 N.E.2d at 856.

¶ 51 Upon review of the record and the case law, we do not find that the trial judge coerced these jurors. In her remarks, the trial judge clearly explained the possibility that the jury would not be able to reach a unanimous verdict. Furthermore, the jury deliberated for an extended period of time–in excess of three hours–after the trial judge provided the supplemental remarks, and this span of time supports an inference that the jury was not coerced. Additionally, we note that when the verdict was announced, the jurors were polled as to their votes. Not one juror expressed any dissatisfaction with the verdict. This fact also supports a conclusion that there was no improper influence. *People v. Kegley*, 227 Ill. App. 3d 48, 57, 590 N.E.2d 922, 930 (1992).

¶ 52 The defendant also argues that by solely focusing on the jury instruction that contained the two elements of the crime, the trial court interfered with jury deliberations. The defendant contends that the jury must consider all of the instructions. See *People v. Cole*, 29 Ill. App. 3d 369, 678, 688, 329 N.E.2d 880, 886 (1975), *abrogated on other grounds by People v. Grabbe*, 148 Ill. App. 3d 678, 499 N.E.2d 499 (1986). We find that this argument is unpersuasive. The foreperson of the jury expressed confusion about how to continue. The judge asked the foreperson if the jury had reviewed the propositions instruction. The jury had not done so. While it is true that the judge advised them to review that instruction, the judge also recommended that they review all of the instructions which were "very thorough" and would provide guidance to the jury.

¶ 53 Because we conclude that the trial judge's supplemental instruction to this jury was not coercive and thus not erroneous, we also find that the defendant would be unable to prove that his attorney was ineffective for failing to object.

¶ 54 CONCLUSION

¶ 55 For the foregoing reasons, we affirm the sentence of the St. Clair County circuit court.

¶ 56 Affirmed.