2017 IL App (1st) 132201-UB

SIXTH DIVISION
February 24, 2017

No. 1-13-2201



IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

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| THE PEOPLE OF THE STATE OF ILLINOIS,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>EDWARD ELLIOTT,<br><br>Defendant-Appellant. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | Appeal from the Circuit Court of Cook County.<br><br><br><br>No. 10 CR 14198<br><br>Honorable Thaddeus L. Wilson, Judge Presiding. |

JUSTICE DELORT delivered the judgment of the court.
Justices Hall and Rochford concurred in the judgment.

**ORDER**

¶ 1 ***Held:*** We affirm defendant's conviction and sentence for first degree murder over his numerous claims of error.

¶ 2 After a jury trial, defendant Edward Elliot was convicted of first degree murder for the shooting death of Anthony Cox and sentenced to 60 years' imprisonment, which included a 25-year firearm enhancement. When the case was first before us, we considered defendant's argument that the circuit court conducted an improper *Batson* hearing. We agreed, remanded the case to the circuit court with instructions to hold a *de novo Batson* hearing, and retained

jurisdiction over four other arguments that defendant made. *People v. Elliott*, 2015 IL App (1st) 132201-U, ¶ 15 (*Elliott I*). On remand, the circuit court denied defendant's *Batson* challenge.

¶ 3 We now consider defendant's claim that the court's ruling following the *de novo Batson* hearing was erroneous, as well as the four arguments raised by defendant which we had previously declined to address. Those arguments are: (1) defendant is entitled to a new trial because the court allowed the State to introduce improper hearsay testimony, (2) the prosecutor denied defendant a fair trial by mischaracterizing the evidence during closing argument, (3) the court violated defendant's rights under the sixth amendment by applying the firearm enhancement to him, and (4) defendant's 60-year sentence is excessive. We reject these arguments and affirm defendant's conviction and sentence.

¶ 4 Background

¶ 5 Defendant was charged by indictment with, among other crimes, first degree murder stemming from the shooting death of Anthony Cox. 720 ILCS 5/9-1(a)(1), (a)(2), (a)(3) (West 2010). He elected to have a jury trial. During *voir dire*, the State exercised peremptory strikes against prospective jurors Allen Jackson, Jolienne Nickel, Michelle Rubio, Jacqueline Tines, and Jessie Davis, in that order. Jackson, Tines, and Davis are African-American, Nickel is Caucasian, and Rubio is Hispanic. After the State struck Tines, defense counsel lodged a *Batson* challenge. The prosecutor responded, "[r]eally? Because I thought Michelle Rubio was a female white." After the court announced that the prosecution had struck Davis, defense counsel stated, "now with the exception of one strike, *** every strike has been used for a person of color."

¶ 6 The court responded by immediately requiring the State to provide race-neutral bases for its strikes. The State explained that it struck: (1) Davis because he was dishonest when answering questions on his juror questionnaire form, (2) Tines because she was a convicted

felon, was the victim in a stabbing, and her grandfather had been murdered, and (3) Jackson because he had been convicted of second degree murder and was not forthcoming about other criminal charges he had faced in the past. The State did not offer any race-neutral explanation for striking Rubio during this *Batson* proceeding. When the State finished its explanations, the court stated "it appears there's a race-neutral basis" and denied defendant's *Batson* challenge.

¶ 7 Before trial, the State disclosed that it planned to call Anthony's brother, Antonio Cox, as a witness. On the day trial was to begin, the State notified the court that Antonio was found in possession of a wallet and badge belonging to an assistant state's attorney that had been taken from the state's attorney's office in the courthouse. The State explained that Antonio was not charged with a crime. Defendant requested that he be allowed to cross-examine Antonio about the theft because "the fact that he returned stolen property to the police yesterday without an arrest *** could *** create a bias for him in this case." The court agreed and ruled that if the State called Antonio, defendant would be allowed to cross-examine him regarding the theft. The State never called Antonio as a witness.

¶ 8 At trial, Chicago police officer Andre Woods testified that around 6:20 a.m. on July 15, 2010, he went to a gas station at 6659 South Halsted Street where he encountered Anthony Cox—a youth he knew from the community—fueling a motorized scooter. Officer Woods and Anthony began talking. Antonio and two other people—Willie Wright and Tyronne Shields—then arrived. Officer Woods left shortly thereafter to respond to a burglary.

¶ 9 Five to 10 minutes later, Officer Woods received a call on his cell phone from Antonio telling him that someone was shooting at Anthony by the gas station. Officer Woods returned to the gas station, where he found Anthony lying face down on the ground. Officer Woods secured the scene and spoke to Antonio after other officers and paramedics arrived.

¶ 10 At this point in his testimony, the following colloquy ensued:

"Q. After you had a conversation with Antonio did you go anywhere?

A. Yes.

Q. Where did you go?

A. I believe it was 6717 or 21 South on Aberdeen.

Q. And why did you go to that location? Were you—Yeah, why did you go to that location?

[Defense counsel]: Objection.

THE COURT: Overruled for now.

A. Antonio had told me that was the address—

[Defense counsel]: Objection, Judge, to the hearsay.

[Assistant State's Attorney]: Judge, it's not - -

THE COURT: It's not being offered for the truth. Overruled for now. I'll hear what the answer is.

***

A. Antonio had informed me that that was the address where *** Mr. Elliott stayed and that's who had shot his brother.

[Defense counsel]: Objection as to Elliott.

[Defense counsel]: Move to strike.

THE COURT: Sustained as to the latter portion regarding identification, but again it's not being submitted at this point for

the truth. It's based on his conduct, explaining his conduct and actions why he took the actions that he took.

A. He used the name J-Rock."

¶ 11 Officer Woods went to the address Antonio provided but was unable to locate any suspects there. He then returned to the gas station and drove Wright to the police station.

¶ 12 Willie Wright testified that he was a friend of Antonio and Anthony's mother, Cheryl Smith. On the morning of July 15, Wright, Antonio, and Anthony went to a gas station. Wright and Antonio were walking, and Anthony was riding a motorized scooter. When they arrived at the gas station, they were met by Tyronne Shields. Shortly thereafter, all four left and began proceeding north on Halsted toward 66th Place, with Wright and Antonio walking together, and Anthony and Shields following behind, arguing about who would ride the scooter.

¶ 13 Once Wright and Antonio reached 66th Place and Halsted Street, they turned east and began walking towards 66th Place and Union Street. At that point, Anthony and Shields were near an auto parts store on 66th Place and Halsted Street. Wright and Antonio stopped to wait for Anthony and Shields. Wright testified that he had a clear view of Anthony and Shields and that he could hear them arguing about the scooter. He estimated that he was eight feet away from Anthony and Shields.

¶ 14 Around this time, Wright saw a man whom he identified in court as defendant riding a bicycle westbound from "66th and Halsted." According to Wright, defendant rode up to Anthony and the two began arguing. Defendant then removed a gun from the waistband of his pants and pointed it at Anthony. Wright heard the trigger click twice; after the second click, the gun fired.

¶ 15 Wright fled down an alley toward Marquette Road. As he fled, he looked over his shoulder and saw defendant flee on the bicycle. Wright emerged from the alley back at the gas station, where he found Anthony laying down on the ground.

¶ 16 At that point, Officer Woods arrived and Wright told him what happened. Eventually, Officer Woods drove Wright to the police station, where he was placed in an interview room. Wright testified that he did not speak with anyone from the time he got to the police station to the time he was placed in the interview room.

¶ 17 Wright was interviewed by Detective Scott Reiff. During the interview, Wright told Detective Reiff that he could identify the shooter. Around 11:14 a.m., Wright viewed a black-and-white photo array. Wright tentatively identified defendant as the shooter but asked to see color pictures because the black-and-white pictures were "too dark." Detective Reiff arranged a second photo array of color photographs and presented them to Wright at 11:32 a.m. Wright again identified defendant as the shooter from the array.

¶ 18 Wright remained at the police station for several hours. At 7:04 p.m., he viewed an in-person lineup, from which he identified defendant as the shooter. Wright stated that he had never seen defendant before July 15, 2010 and that while he was at the police station, he did not have any contact with Shields, Antonio, or anyone else involved in the case besides Detective Reiff.

¶ 19 On cross-examination, Wright conceded that he asked to see color photographs because he was not sure of his identification based on the black-and-white photo array. Wright also testified that the night before the shooting, he was at Smith's house and had been awake the entire night. Wright also reiterated his prior testimony that he was eight feet from Anthony and Shields when defendant shot Anthony. In response, defense counsel asked Wright to estimate the distance in the courtroom between defense counsel and Wright. Wright estimated the

distance to be three feet. The judge, after being prompted by defense counsel, stated that the distance was 10 to 12 feet.

¶ 20 Wright was also confronted with testimony he gave before the grand jury, wherein he stated that he saw defendant flee north on Halsted Street towards 66th Street and then turn left in the direction of Aberdeen Street. Wright acknowledged that Aberdeen Street was six blocks away and that he watched defendant flee while looking over his shoulder as he ran down an alley. When asked by defense counsel how he knew defendant fled towards a street six blocks away, Wright stated, "Ma'am, I just picked the address, Joe." Elaborating, he explained that he picked "a random street and gave it to the police and that's where they got him from." Wright denied that he knew that defendant lived on Aberdeen, but he admitted that he had heard the name Edward Elliot prior to the shooting and testified that "everybody in the neighborhood knew who did it."

¶ 21 On redirect examination, Wright testified that he was not told on the morning of July 15 that a man named Edward Elliot shot Anthony and that he did not hear anyone mention that name or the nickname J-Rock.

¶ 22 Terrion Smith testified that his mother was Cheryl Smith and that Anthony and Antonio were his brothers. According to Terrion, on the morning of July 13, 2010, he was sitting with five people on the outside porch of Cheryl's house at 66th Street and Union Avenue. Cheryl's next door neighbor, Imogene Green, was also outside, sitting on her porch. Sometime between 6 and 7 a.m., a man Terrion called J-Rock, and whom he identified in court as defendant, walked up and threatened to kill Terrion and his brothers if they did not return money they owed him. According to Terrion, defendant pulled up his shirt, revealing that he was carrying a chrome

revolver in the waistband of his pants, and said "[i]f all these people wasn't on the porch, I would kill you right here."

¶ 23 On July 15, Terrion went to the police station and told the police what happened. Afterwards, he viewed a photo lineup at the police station, from which he identified defendant as the man who made the threats.

¶ 24 On cross-examination, Terrion testified that a man on the porch named "Woo Woo" approached defendant and asked if he could settle the dispute. Terrion acknowledged that he did not mention Woo Woo when he spoke to the police.

¶ 25 Tyrone Shields testified that on the morning of July 15, 2010, he went to a bus stop at 66th Street and Halsted Street, where he saw Wright, Antonio, and Anthony. According to Shields, Wright and Antonio were walking, and Anthony was riding a motorized scooter. Shields began arguing with Anthony about the scooter because he wanted to ride it. As they argued, Shields and Anthony proceeded south down Halsted Street from 66th Street to the corner of Halsted Street and 66th Place.

¶ 26 Shields testified that while he and Anthony were at the corner of 66th Place and Halsted Street, a man whom he later identified as defendant rode up on a bicycle, got off, and approached them. Shields turned to face defendant and saw that he was holding a chrome revolver. Shields testified that defendant said something about money that someone owed him. When defendant was less than a foot away from Anthony, he fired the gun once, striking Anthony in the chest.

¶ 27 Shields and Anthony ran back to the gas station, where Anthony collapsed. After the police and paramedics arrived, Shields went to Anthony's house and told Cheryl that Anthony had been shot. Later that day, Shields spoke to Antonio and, at his urging, went to the police station. Shields testified that he had previously heard the name J-Rock but did not know what J-

Rock looked like. At the police station, Shields viewed a lineup, from which he identified defendant as the shooter.

¶ 28 On cross-examination, Shields testified that he discussed the shooting and a person named J-Rock with Antonio before he went to the police station. Shields further testified that he heard about an incident between Antonio and J-Rock, but he clarified that he did hear about it from Antonio.

¶ 29 Imogene Green, Cheryl's next-door neighbor, testified that on the morning of July 12, 2010, she was sitting outside on her porch. Around 6 a.m., a man Green called J-Rock, and whom she later identified as defendant, rode up on a bicycle and asked her whether she knew Cheryl. Green stated that she was Cheryl's friend. In response, defendant told Green to tell Cheryl to "get her black dress ready because I'm going to kill Tonio and his friends, them n***s." Green immediately went upstairs and called Cheryl.

¶ 30 The next morning, Green was sitting on her porch while Terrion was next-door outside with five to six people. At some point, defendant returned, walked inside Cheryl's gate, and threatened to kill Terrion, stating, "you lucky it's witness out here because I'd have killed you." As defendant walked away, one of Terrion's friends approached defendant and asked, "can we scratch this?" Defendant turned, said "no," raised his shirt to reveal a gun, and then stated, "you better tell them n***s they better be strapped, because I'm coming to kill Tonio and them other n***s."

¶ 31 On the evening of July 15, 2010, a detective from the Chicago police department came to Green's apartment and drove her to the police station. Green viewed a lineup, from which she identified defendant as the person who made the threats.

¶ 32 Detective Daniel Kienzle testified that sometime on July 15, 2010, Green told him about the man who made the threatening statements against the Cox brothers. Around 7 p.m. that day, Green came to the police station and viewed a lineup from which she identified defendant as the person who threatened to kill Terrion and Antonio. According to Detective Kienzle, once Green arrived at the police station, she was not able to talk to anyone about the lineup other than police officers, and no one was present for the lineup other than Green, Detective Kienzle, and his partner.

¶ 33 Lauren Woertz testified that she was a deputy medical examiner with the Cook County medical examiner's office. On July 16, 2010, Dr. Woertz performed an autopsy on Anthony. The autopsy revealed that Anthony sustained a gunshot wound to his abdomen. Dr. Woertz concluded that Anthony's cause of death was a gunshot wound to the abdomen and that his manner of death was homicide.

¶ 34 On cross-examination, Dr. Woertz testified that Anthony was six feet tall and that the bullet entered his abdomen just below his chest and then traveled downward. She explained that her examination did not reveal evidence of close-range firing. On re-direct, Dr. Woertz testified that she could not determine how Anthony's body was positioned when he was shot.

¶ 35 Detective Daniel Stanek testified that defendant was taken into custody at 12:30 p.m. on July 15, 2010. At 1:40 p.m., he observed forensic investigators collect samples from defendant's hands, shorts, and shirt for a gunshot residue (GSR) test.

¶ 36 Ellen Chapman, whom the court accepted as an expert in forensic science trace evidence, testified that she tested the samples from defendant's shorts, shirt, and hands for the presence of GSR. She explained that GSR is a three-part particle formed when the intense heat and pressure caused by the explosion of gun powder causes lead, barium, and antimony—metals present in

ammunition primer—to vaporize and condense into a single particle. Chapman explained that when she "find[s] three of those tri-component GSR particles on a sample and a number of those consistent particles, then *** that sample is consistent with having GSR on it and the subject may have discharged a firearm." However, she explained that when two or fewer tri-component GSR particles are found on a sample, "it would be considered a negative."

¶ 37 Chapman tested the upper and lower front of defendant's T-shirt. According to her, both sample sites "contained a minimum of three tri-component GSR particles and a number of consistent primer residue particles." She explained that these results "indicate[d] that the sampled areas of the T-shirt either contacted GSR or were in the environment of a discharged firearm." Chapman also tested the samples from defendant's hands and shorts. She found that these samples contained particles "characteristic of background samples" and thus concluded that they were "essentially negative." She clarified that meant that defendant "may not have discharged a firearm; if he did ***, the particles were removed by activity, not deposited or not detected by our procedure."

¶ 38 Chapman also explained that the Illinois State Police Laboratory recommends a "six-hour time frame between shooting and sampling" based on a validation study which revealed that gunshot residue particles fall off a subject's hands within six hours of discharging a firearm even if the person is not trying to remove the gunshot residue. However, she noted that the six-hour time frame does not apply to the testing of clothing. She testified that it is possible for gunshot residue particles to move from one area to another by transference and that she could not exclude the possibility that the GSR on defendant's shirt may have gotten there by transference.

¶ 39 After cross-examination, Chapman clarified that it is possible for gunshot residue to be found on a person six hours after discharging a firearm. She explained that "what removes the

GSR is activity." Elaborating on that point, she explained that "anybody that has tried to remove the GSR, wipe their hands, wash their hands, even putting clothing on, put their hands in their pockets, that's going to get rid of the GSR."

¶ 40 Detective Scott Reiff testified that around 7:30 a.m. on July 15, 2010, he was informed that the suspect in Anthony's murder had the nickname J-Rock and lived at 6717 South Aberdeen Street. Detective Reiff searched the police department's database for individuals associated with that address who fit the suspect's description and had prior arrests. The search returned a picture of defendant and his name.

¶ 41 Detective Reiff used the picture to create a photo array which he showed Wright. Wright made a tentative identification of defendant but requested color photographs so that he could be sure of his identification. Detective Reiff then presented Wright with a color array, from which Wright again identified defendant. According to Detective Reiff, Wright was "very quick and precise" when making the second identification and said he was "a hundred percent sure and that he never forgets a face."

¶ 42 After Wright identified defendant, Detective Reiff contacted police officers at the 7th District station and told them that probable cause existed for defendant's arrest. At 12:40 p.m., Detective Reiff was informed that defendant was in custody. At 7:04 p.m., Detective Reiff met with Wright and had him view a lineup, from which Wright identified defendant as the shooter.

¶ 43 After the State rested its case, defendant moved for a directed verdict, which the court denied. Defendant did not testify and he did not present any witnesses in his defense.

¶ 44 The trial court then held an instruction conference. People's Instruction 20, which was labeled "I.P.I. Criminal No. 7.02," but which in reality was a non-pattern instruction, read:

> "To sustain the charge of first degree murder, the State must prove the following propositions:
>
> *First Proposition:* That the defendant personally discharged a firearm that proximately caused death of Anthony Cox; and
>
> *Second Proposition:* That when defendant did so,
>
> he intended to kill or do great bodily harm to Anthony Cox;
>
> or
>
> he knew that his acts created a strong probability of death or great bodily harm to Anthony Cox;
>
> If you find from your consideration of all the evidence that each one of these propositions has been proved beyond a reasonable doubt, you should find the defendant guilty.
>
> If you find from your consideration of all the evidence that any one of these propositions has not been proved beyond a reasonable doubt, you should find the defendant not guilty."

Defendant neither objected to People's Instruction 20 nor tendered an alternative instruction. The instruction was given to the jury.

¶ 45 During closing argument, the prosecutor discussed Chapman's testimony about the GSR tests:

> "The expert told you what gunshot residue is. Lead, barium, antimony. Not just those three particles separate, but those

> three particles together, which are only found and only known to come together from the discharge of a firearm.
>
> The only way that lead, barium and antimony will come together as one particle is through the discharge of a firearm. She found traces of lead, barium and antimony as a tri-component on the defendant's shirt. The only way those elements would get on the defendant's shirt is from discharging a firearm or being near the discharge of a firearm.
>
> We know in this case, through the evidence, the testimonial evidence, that this gunshot residue got on the Defendant's white tee-shirt from shooting Anthony Cox. Two eyewitnesses put the gun in his hands. Two eyewitnesses have him pulling the trigger. Two eyewitnesses have Anthony Cox being shot. The gunshot residue got there from the defendant shooting that gun.
>
> There was testimony about particles found on the shirt. Lead by itself. Barium by itself. Other particles. Gunshot residue is the three components together. If there are two or more of those found, it is a positive match. Scientific, reasonable degree of scientific certainty, it is gunshot residue. That was then recovered from the defendant's shirt."

¶ 46 Thereafter, the case was submitted to the jury. Two hours into its deliberations, the jury sent a note to the judge asking, "[w]hat happens if we agree to disagree and the result is a hung jury?" The court conferred with the parties and, fifteen minutes after receiving the note, told the

jury to continue deliberating. Twenty-five minutes later, the jury returned a verdict finding defendant guilty.

¶ 47 Defendant filed a motion for new trial, which the court denied. The court then proceeded to sentencing. In mitigation, defense counsel asserted that the Anthony and Antonio had "robbed and beat" defendant and "held him at gun point, and kidnapped him in front of his own home," which according to defense counsel was the reason "why they identified [defendant]." Defense counsel also explained that defendant has struggled with substance abuse problems. Defendant declined to speak in allocution.

¶ 48 The court sentenced defendant to 60 years' imprisonment, consisting of 35 years for first degree murder and 25 years for a firearm enhancement. The court explained that it considered:

> "the evidence at trial, the gravity of the offense, the presentence investigation report, the financial impact of incarceration, all evidence, information, and testimony in aggravation and mitigation, any substance abuse information and treatment. The potential for rehabilitation, and the possibility of sentencing alternatives, and all hearsay presented and deemed relevant and reliable."

Defendant filed a motion to reconsider sentence which the court denied. This appeal followed.

¶ 49 On appeal, defendant argued, among other things, that the circuit court erred by failing to conduct a proper *Batson* inquiry. In *Elliott I,* we held that the circuit court erred during the *Batson* process. *Elliott I,* 2015 IL App (1st) 132201-U, ¶¶10-13. We remanded the case to the circuit court for a *de novo Batson* hearing, and we retained jurisdiction over defendant's remaining claims. *Id*. ¶¶ 14, 17.

¶ 50 On remand at the *Batson* hearing, defendant pointed out that the State exercised five peremptory strikes, four of which were levied against minority venirepersons: three against African Americans (Davis, Tines, and Jackson), and one against a Hispanic (Rubio). The court found defendant had made a *prima facie* case of discrimination and moved to the second stage of the *Batson* process, at which point the court prompted the State to provide race-neutral explanations for its strikes.

¶ 51 The State explained that it struck Jackson because: (1) "he was convicted of second degree murder," (2) "he had an arrest for 2000," (3) "[h]e knew people who had been shot," and (4) "[h]e wasn't forthcoming in his arrest history." The court found "the race-neutral basis *** to be sufficient and legitimate bases commonly exercised by both defense and State for exercising peremptory challenges."

¶ 52 Next, the court asked the State to discuss its reasons for striking Rubio. That led to the following colloquy:

> "[Assistant State's Attorney]: Michelle Rubio was the telemarketer. She had two-tone hair. And this was not today. It was four years ago with her two-tone hair. And she had an arrest for criminal damage to property. And she had a friend who was killed with a firearm. And she intimated that she was a victim of a criminal case that was still pending.
>
> [Assistant State's Attorney]: I believe it's also important to note that both me and my partner believe Ms. Rubio to be *** a female white, and not Hispanic.

THE COURT: Well, I remember her also. She did appear to be female white. However, she says she was Hispanic. That was on the record ***.

[Assistant State's Attorney]: And she did—

THE COURT: *** But was there any doubt that she—how she appeared, defense?

[Defense counsel]: No. I think she did appear to be Caucasian, but she did say that she was Hispanic, very clearly.

[Assistant State's Attorney]: And I would also say—

THE COURT: Yes, she did.

[Assistant State's Attorney]: — that when—as far as my partner and I are concerned, he has a diagnosed hearing loss.

[Assistant State's Attorney]: That's correct.

[Assistant State's Attorney]: And I literally just—we just did not even hear her say that she was Hispanic[.]"

¶ 53 After that discussion, the court asked the State to set forth its race-neutral reason for striking Rubio, leading to the following colloquy:

"[Assistant State's Attorney]: Our race-neutral reasons were that she—it was the way she looked. That she had two-toned hair, what she did for a living. She was a telemarketer. She was unmarried. She had two children.

[Assistant State's Attorney]: History of domestic violence.

> [Assistant State's Attorney]: She had a history. Again, she had a case pending where she might have been the victim. It was unclear. She just said it was ongoing.
>
> THE COURT: And she had an arrest?
>
> [Assistant State's Attorney]: Yeah. She had an arrest for criminal damage to property.
>
> THE COURT: Were any others that were kept by the State that had arrests?
>
> [Defense counsel]: No, Judge."

¶ 54 Thereafter, the court found "the State's basis for striking [Rubio] to be race neutral." The court explained:

> "It has been consistent and customary for State to strike members of the jury who—panel who have backgrounds, criminal backgrounds, even though that's not a basis for cause to strike anybody. It is routinely used.
>
> It appears that the State did not at least prior to this keep anyone else who had a criminal background or who may have still had some type of involvement with the criminal justice system still pending. And that prior to her, there was at least one other Mexican-American who had not been challenged."

¶ 55 Next, the State explained that it struck Tines because: (1) her grandfather was murdered in 1992, (2) her cousin was murdered the year before this case began, (3) she was "a victim of multiple stabbings," (4) she had a felony conviction, and (5) "she had to be out by 6:00 o'clock

every day." The State clarified that Tines was struck "mostly for the prior criminal convictions." The court found the State's bases to be race-neutral.

¶ 56 Next, the State explained that it struck Davis because he: (1) had a drug conviction, (2) "had friends in correctional facilities," (3) owned guns, (4) "had a close friend who was killed," and (5) did not answer questions on his juror card truthfully. The court found the State's bases to be race-neutral. The court explained: "if the State of Illinois is going to allow peremptory challenges ***, then the prosecutor is right to be concerned as to whether or not a person they've prosecuted or had been prosecuted in another jurisdiction *** as to whether or not they're going to take this opportunity to seek their revenge."

¶ 57 The court then permitted defendant to respond to the State's race-neutral explanations. Defense counsel conceded that "nobody else had any criminal history other than the people that were struck." Defense counsel pointed out that the State claimed that had struck jurors because they "had close relatives or friends who died from violence." Despite that claim, defense counsel noted that two Caucasian jurors—Lilly West and Carolyn Cristofani—were seated on the jury even though: (1) West's boyfriend's brother was killed by a firearm and (2) Cristofani stated that three boys were shot on the street she lived on. In response, the State argued that the circumstances West and Cristofani were not similarly situated because "[Tine's] grandfather was murdered and her cousin was killed, which is not the same thing as my boyfriend's brother."

¶ 58 The court then denied defendant's *Batson* challenge. The court explained:

> "One, I do believe *** it looked bad. And so we had to address it. And the court was, I recall, concerned that it might have to make his own Battson [*sic*] challenge just to make the record. So I was relieved when the defense finally made the

> Battson [*sic*] challenge so that we could make the record and deal with this issue because I knew it looked bad.
>
> But I could see from picking all of the jurors and my notes, that, yeah, there is likely legitimate basis as to why the State is striking these individuals. But it just looked bad.
>
> But on top of that, I believe the defense has articulated a sufficient basis to go to the first stage. I believe the State has articulated a perfectly legitimate race-neutral basis as to why they struck the individuals that they struck.
>
> And even considering the rebuttal argument made by the defense, I still believe that the jury was picked in a fair and proper *** manner and that there was no Battson [*sic*] violation.
>
> ***
>
> *** And so although, admittedly, it just looked bad, as far as the Court was concerned, that's all it *** amounted to, was looking bad, and that the defense has not made a case of purposeful discrimination."

¶ 59 ANALYSIS

¶ 60 A. Defendant's *Batson* Challenge

¶ 61 We first consider defendant's claim that the court erred by denying his *Batson* challenge. "The 'Constitution forbids striking even a single prospective juror for a discriminatory purpose.' " *Foster v. Chatman*, 578 U.S. ___, 136 S. Ct. 1737, 1747 (2016) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008)). In *Batson*, the Supreme Court established a three-step

procedure to analyze allegations of race discrimination in jury selection. At the first stage, the defendant carries the burden of making a *prima facie* case of purposeful discrimination. *Batson*, 476 U.S. at 97. At the second stage, "the burden shifts to the State to come forward with a neutral explanation" for its challenges. *Id.* Finally, at the third stage, the circuit court must determine whether the State engaged in purposeful discrimination. *Id*. at 98.

¶ 62 Defendant first argues that, with respect to Rubio, the court erred by articulating its own race-neutral basis for the State's strike—namely, her criminal conviction—and then relying on that basis to uphold the strike. Specifically, defendant claims, "[o]nly after being bailed out by the judge, when he asked, 'And she had an arrest?' did the State mention that Rubio had been arrested for criminal damage to property (generally a misdemeanor)."

¶ 63 This argument misrepresents the record. In fact, the State noted that Rubio had a criminal conviction immediately—and of its own volition—when the judge first asked the State to provide a race-neutral explanation for its strike of Rubio. Specifically, at lines 8-9 of page 22 of the supplemental record, the judge asked the State to discuss Rubio. Five lines later, the transcript show the prosecutor stated, "she had an arrest for criminal damage to property."

¶ 64 In the same vein, defendant asserts that the trial court "exceeded its proper role by actively asserting reasons *it* believed would have been logical for striking certain jurors." Continuing, defendant cites pages 14 through 16 of the supplemental record for the assertion that the court "admitted that it 'had its own thoughts in its head about why the State might have legitimate basis for [striking] individuals.' "

¶ 65 This argument is rife with problems, the least of which is that the above-quoted statement is not found on pages 14, 15, or 16 of the supplemental record. The more serious problem is that the actual quote (which occurs at page 19 of the supplemental record) is benign when read in

context. The court's full statement (with the portion to which defendant objects italicized) reads as follows:

> "Just so the Appellate Court knows, this judge is black and is keen and sensitive to situations with respect to jury and jury pools and jury makeup. So that—You know, and so I am keenly aware, and, therefore, I treat a very low threshold and we move, you know, I would say rather matter-of-factly to second stage. I perhaps should have said more in the record as to why I believe that the defense was pointing to things, but *** I was experiencing it as the defense was experiencing it. *And even though I had thoughts in my head about why the State might have legitimate basis for individuals,* I still moved it to the second stage.
>
> Anything else with respect to first stage?"

As the record makes clear, the statement which defendant cites as evidence that the judge asserted its own race-neutral explanations for the State's strikes—a second-stage issue—occurred during the first stage, before anyone discussed any race-neutral bases for any of the State's strikes. The record thus refutes defendant's argument.

¶ 66 The court's determination that the State did not engage in purposeful discrimination by striking Rubio was not error. At the third stage, the circuit court must assess "the genuineness of the State's explanation along with the State's credibility in offering the explanation." *People v. Martinez*, 317 Ill. App. 3d 1040, 1044 (2000). The court's findings are entitled to "great deference" and will not be set aside unless they are clearly erroneous. *Id*. The record shows that the court did not immediately accept the State's explanation without question. To the contrary,

the court inquired whether the State had accepted any jurors "that had arrests." Only after *defense counsel* conceded that the State had not accepted any jurors with arrests did the court determine that the State did not engage in purposeful discrimination by striking Rubio.

¶ 67 In spite of this, defendant claims that the prosecutor's statement that Rubio was struck because she was unmarried and had two children is evidence of pretext because Vanessa Victory, who actually served on the jury, was also unmarried and had *five* children. Says defendant: "Of course, a reason that applies equally to an unstruck *white juror* is likely to be a pretext for discrimination." This argument is puzzling in light of the following colloquy that took place during Victory's voir dire:

> "Q. [The Court:] What is your race or ethnic background?
>
> A. [Victory:] African American."

¶ 68 With respect to Jackson, Tines, and Davis, defendant argues that the circuit court erred because the State "never articulated how its asserted race-neutral reasons related to the venire member's service on the jury." We cannot determine whether defendant is challenging the second or third *Batson* stage with respect to these jurors. To the extent defendant is arguing that the State failed at the second stage, his argument is unavailing. It is well established that at the second *Batson* stage, the State is only required to submit a race neutral reason; the reason does not have to be "persuasive, or even plausible." *Purkett v. Elem*, 514 U.S. 765, 768 (1995).

¶ 69 Defendant's claim fares no better when construed as a third-stage challenge. "[T]he critical question in determining whether a [defendant] has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike." *Miller-El v. Cockrell*, 537 U.S. 322, 338–39 (2003); see *Purkett*, 514 U.S. at 769 (holding that

appellate court erred by considering the reasonableness of the prosecutions explanations rather than the genuineness of the explanation); *People v. Pecor*, 286 Ill. App. 3d 71, 81 (1996) ("At the third stage of the *Batson* process, the trial court must assess the credibility of the prosecutor and the genuineness of his or her explanation in order to determine whether the explanation provided was pretextual.") (internal quotation omitted). That determination, in turn, hinges on whether the circuit court finds the prosecutor credible. *Miller-El*, 537 U.S. at 339. "Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy." *Id*.

¶ 70 In this case, the record demonstrates that the circuit court adequately considered the persuasiveness and genuineness of the State's race-neutral explanation that it struck Jackson, Tines, Davis, and Rubio because of their respective criminal records. Jackson was the first juror discussed during the hearing. The court accepted the State's explanation with respect to Jackson almost without qualification. However, as we have noted, when discussing Rubio, the court inquired whether the State had accepted any jurors with arrest records. Defense counsel acknowledged that the State had not. The court noted that it was "consistent and customary" for the State to strike jurors with "criminal backgrounds" and accepted the State's explanation. After the State explained that it struck Tines because she had a criminal background, the court accepted the strike, stating, "[a]gain, I find that the *** basis given by the State *** is race-neutral, consistent with the backgrounds of jurors who are routinely striked [*sic*], even if it's not a basis for cause." Finally, after the prosecutors explained that they struck Davis due to his criminal history, the court stated, "[a]gain, the Court finds that the basis given by the State to be

race-neutral consistent with common practices as to members—the State and in many cases, the defense seek to strike."

¶ 71 Our ultimate task when reviewing a *Batson* claim is to determine whether the circuit court's finding that the State did not engage in purposeful discrimination was clearly erroneous. *Martinez*, 317 Ill. App. 3d at 1044. Based on the above analysis and the record before us, we find that the circuit court's ultimate finding that the State did not engage in purposeful discrimination was not clearly erroneous.

¶ 72 B. Confrontation Clause

¶ 73 We next consider defendant's argument that he is entitled to a new trial because the trial court allowed the State to introduce improper hearsay testimony in violation of defendant's rights under the sixth amendment. The sixth amendment prohibits the admission of hearsay unless the declarant is "unavailable to testify, and the defendant had had a prior opportunity for cross-examination." *Crawford v. Washington*, 541 U.S. 36, 54 (2004).

¶ 74 The State does not dispute that Antonio's statement to Officer Woods in which he identified defendant as the shooter was testimonial, and therefore within the scope of the sixth amendment. See *Hammon v. Indiana*, 547 U.S. 813, 822 (2006). The only issue, therefore, is whether Officer Woods's testimony in which he stated that Antonio told him defendant shot Anthony falls within a recognized exception to the hearsay rule.

¶ 75 The State argues that Officer Woods's answer was admissible as course-of-investigation testimony. See *People v. Gacho*, 122 Ill. 2d 221, 248 (1988). The course-of-investigation rule permits police officers to testify about their "investigatory procedures, including the existence of conversations," even if in so doing "a logical inference may be drawn that the officer took subsequent steps as a result of the substance of that conversation." *People v. Jones*, 153 Ill. 2d

155, 159-60 (1992). Nonetheless, the rule does not permit police officers to testify about the substance of their conversations with non-testifying witnesses. *Gacho*, 122 Ill. 2d at 248.

¶ 76 The testimony in question is textbook hearsay and thus beyond the scope of course-of-investigation rule. Officer Woods did not merely testify that he talked to Antonio and then did something as a result of the conversation. Instead, Officer Woods testified that Antonio told him that defendant was the shooter. The truth or falsity of that assertion is the exact fact at issue in this case. As such, the State's suggestion that it elicited this testimony merely to assist the jury in understanding how the police investigated this crime is unconvincing. Our skepticism of the State's position is furthered by the fact that Antonio, whose out-of-court statement Officer Woods testified to, was rendered essentially unpresentable as a witness because he would have been subjected to cross-examination regarding the uncharged theft. Accordingly, we find that the circuit court committed error by allowing Officer Woods to testify that Antonio told him defendant was the shooter.

¶ 77 Having found error, we must determine whether defendant is entitled to relief. Trial errors relating to the improper admission of hearsay testimony are subject to harmless error analysis. *In re Brandon P.*, 2014 IL 116653, ¶ 50. To determine whether a constitutional error was harmless, we ask "whether it appears beyond a reasonable doubt that the error at issue did not contribute to the verdict obtained." *People v. Patterson*, 217 Ill. 2d 407, 428 (2005). The Illinois Supreme Court has set forth three different tests to determine whether a constitutional error is harmless. The first approach requires us to "focus[ ] on the error to determine whether it might have contributed to the conviction." *Id*. Under the second approach, we must "examin[e] the other evidence in the case to see if overwhelming evidence supports the conviction. *Id*. Under the third and last approach, we must "determin[e] whether the improperly admitted

evidence is merely cumulative or duplicates properly admitted evidence." *Id*. Regardless of which test is applied, the State bears the burden of showing harmlessness. *Id*.

¶ 78 The error is harmless under each approach. The State presented overwhelming evidence of defendant's guilt. Wright and Shields testified that they saw defendant shoot Anthony, Terrion and Green testified that they witnessed defendant threaten to kill the Cox brothers days before the shooting, and Chapman testified that defendant's shirt tested positive for GSR.

¶ 79 Defendant suggests that the evidence was closely balanced because (1) he did not make an inculpatory statement, (2) the State produced minimal physical evidence against him, (3) the jury "struggled to reach a verdict," and (4) Wright, Shields, and Green were "severely" impeached. None of these arguments have merit.

¶ 80 We decline to attach significance to the fact that defendant did not incriminate himself to the police. The reasoning that undergirds this argument has no logical end. A ruling endorsing defendant's view would unavoidably carry the message that a case is closely balanced whenever the defendant does not make an incriminating statement. That is not and has never been the law. See, *e.g.*, *People v. Melton*, 2013 IL App (1st) 060039, ¶ 55 (finding evidence overwhelming even though the defendant did not make an incriminating statement to the police); *People v. Kotero*, 2012 IL App (1st) 100951, ¶ 32 (same); *People v. Duff*, 374 Ill. App. 3d 599, 605 (2007) (same).

¶ 81 Defendant's argument concerning the quantity of physical evidence the State mustered against him likewise misses the mark. Defendant does not explain why the police's failure to recover the gun renders the evidence close. In the course of emphasizing that two of three GSR tests were negative, defendant ignores that one test *was* positive. And defendant's claim that the medical examiner suggested that the shooter had to be taller than defendant ignores Woertz's

testimony that she could not determine how Anthony's body was positioned relative to the shooter when Anthony was shot.

¶ 82 Defendant's insistence that the jury's question suggests it struggled to reach a verdict rings equally hollow. Although the jury asked what would result if it deadlocked, the jury: (1) never stated that it was deadlocked, (2) did not ask questions about the evidence, (3) was not instructed by the court to reach a verdict, and (4) reached its verdict after less than three hours of deliberation. See *People v. Thompson*, 155 Ill. App. 3d 871, 873 (1987) (rejecting harmless error argument where record showed that jury twice declared it was deadlocked, repeatedly asked for instructions and reached a verdict only after the judge "commanded" it to reach a verdict).

¶ 83 Finally, Wright, Shields, and Green were not severely impeached. Defendant suggests that Wright was impeached in six ways. First, defendant points out that Wright was a friend of Anthony's mother, Cheryl. Impeachment evidence is evidence that "undermine[s] a witness's credibility." Black's Law Dictionary 637 (9th ed. 2009). Defendant has not explained—and we cannot ourselves understand—how the fact that Wright and Cheryl were friends undermined Wright's testimony.

¶ 84 Second, defendant notes that Wright had been awake for the entire night before the morning when the shooting occurred. It is true that Wright stated during cross-examination that he was uncertain of his identification of defendant from the black-and-white photo array in part because of how long he had been awake. But Wright was candid about that, and went so far as to request a second, color photo array so that he could be certain of his identification. Viewing Wright's testimony as a whole, we are unconvinced that this even qualifies as impeachment evidence. If anything, the evidence that Wright requested to view a color array to verify his first identification may have *bolstered* his credibility in the eyes of the jury.

¶ 85 Third, defendant notes that Wright stated that the shooting occurred quickly and was frightening. Again, we do not see how that suggests that Wright was lying or otherwise undermined his credibility. We reiterate that Wright identified defendant in two photographic arrays and a lineup, and Detective Reiff noted that Wright's identification from the color array was "very quick and precise."

¶ 86 Fourth, defendant emphasizes that Wright was uncertain of his initial identification. We already explained, however, that this fact actually cuts in favor of the State, because Wright asked for a second photo array to ensure the accuracy of his identification.

¶ 87 Fifth, defendant notes that Wright was impeached regarding his ability to gauge distances. But whether Wright was eight feet or 80 feet away from Anthony and Shields when defendant approached, the fact remains that he identified defendant at least twice at the police station.

¶ 88 Finally, defendant points out that Wright stated during his grand jury testimony that defendant fled to Aberdeen Street, even though Aberdeen Street was six blocks from where the shooting took place and thus presumably out of view. However, defendant ignores that at trial, Wright: (1) clarified that he simply chose a random street which defendant was heading towards to describe the direction of defendant's flight from the crime scene and (2) stated that he did not know that defendant lived on Aberdeen Street.

¶ 89 Defendant suggests that Shields was impeached in three ways. First, he notes that Shields was a felon. But the State itself questioned Shields about his criminal record during direct examination. Shields answered immediately, admitting that he was convicted of delivery of a controlled substance and unlawful use of a firearm in 2009. Defendant has not argued that Shields lied about his criminal record. This was not impeachment evidence.

¶ 90 Second, defendant notes that Shields discussed J-Rock with Antonio before Shields identified defendant. Defendant has not explained how that fact impeached Shields. It is possible that this argument is a rehash of trial counsel's attempt to show that Antonio somehow caused Wright and Shields to falsely implicate defendant because Antonio and defendant were feuding. But defendant never produced any evidence that Antonio showed Shields a picture of J-Rock, and Shields testified that he had never seen defendant before the shooting.

¶ 91 Finally, defendant contends that Wright and Shields offered contradictory testimony because Wright said the gun misfired twice and Shields did not mention any misfires. This argument is fundamentally incorrect. Two statements are "contradictory" when they are "so related" to each other that "if either of the two is true the other must be false and if either is false the other must be true." Merriam Webster's Third New International Dictionary 495 (1986). Suppose that witness *A* testified that an intersection where a traffic accident occurred had a stop sign, and witness *B* testified that the intersection did not have a stop sign. Those statements are contradictory; the intersection cannot simultaneously have and not have a stop sign. Here, we are not even presented with two statements, let alone statements that are contradictory, because Shields—who, notably, testified after Wright—was not asked whether he heard the gun misfire. Therefore, the omission of that fact from his testimony did not contradict Wright's testimony. This is not impeachment.

¶ 92 That brings us to Green. Of her, defendant argues in a single sentence that she was "combative and confused" and "*heavily* impeached" (emphasis ours) with testimony that she gave before a grand jury. Defendant does not explain what Green was confused about or how she was combative. Moreover, "combative" is a subjective term which defendant has not in any

manner attempted to define. As a result, we cannot assess defendant's claim that Green was a combative witness.

¶ 93 The grand jury testimony to which defendant alludes related to the number of people Green recalled being present for the second threat incident. Before the grand jury, Green stated that only Terrion and two other individuals were present on Cheryl's porch; at trial, she said Terrion was with five to six people. That was actually impeachment, but it related to a collateral issue; we cannot fathom how this testimony could have impugned Green to such an extent as to cause to the jury to disbelieve her testimony.

¶ 94 We therefore reject defendant's argument that Wright, Shields, and Green were severely impeached and find that the State produced overwhelming evidence of defendant's guilt. With that finding in hand, we now consider whether: (1) the improper evidence was duplicative of properly admitted evidence and (2) it is possible that the improper testimony contributed to the verdict. Wright's testimony and Shields's testimony—the propriety of which defendant does not challenge—identified defendant as the shooter. Antonio's improper "testimony" also identified defendant as the shooter. The improper evidence was therefore duplicative of the properly admitted evidence. See *People v. Becker*, 239 Ill. 2d 215, 240 (2010). And, because the evidence was overwhelming and the hearsay testimony was duplicative, it is not reasonably possible that the outcome of defendant's trial would have been different had the hearsay testimony not been admitted. Accordingly, we find that the admission of the hearsay testimony in this case was harmless beyond a reasonable doubt.

¶ 95 C. Closing Argument

¶ 96 Defendant next argues that he is entitled to a new trial because the State misstated the forensic evidence during closing argument. We review this issue for plain error because defendant did not object at trial.

¶ 97 Defendant argues that he is entitled to relief under the closely-balanced prong of the plain error doctrine. That prong allows us to reach unpreserved errors that are "clear or obvious" if "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." *People v. Piatkowski*, 225 Ill.2d 551, 565 (2007). But since we have already determined that the State presented overwhelming evidence of defendant's guilt, it follows that the evidence was not closely balanced. That cuts off defendant's route to relief under the plain-error doctrine.

¶ 98 Even if the evidence in the case was closely balanced, defendant's argument would still fail. "A prosecutor has wide latitude in making a closing argument and is permitted to comment on the evidence and any fair, reasonable inferences it yields." *People v. Glasper*, 234 Ill. 2d 173, 203 (2009). "[C]losing arguments must be viewed in their entirety, and the challenged remarks must be viewed in context." *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007). "[I]mproper remarks will not merit reversal unless they result in substantial prejudice to defendant, in light of the context of the language used, its relationship to the evidence, and its effect on the defendant's right to a fair and impartial trial." *People v. Billups*, 318 Ill. App. 3d 948 958-59 (2001). Substantial prejudice exists where the improper comments "constituted a material factor in a defendant's conviction." *Wheeler*, 226 Ill. 2d at 123. "If the jury could have reached a contrary verdict had the improper remarks not been made, or the reviewing court cannot say that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted." *Id*.

¶ 99 Defendant argues that the prosecutor misstated the forensic evidence by stating that the "only way" that GSR could get on defendant's shirt was by firing a gun. When that statement is considered in context, however, it is clear that the prosecutor was arguing that, based on the totality of the evidence presented in the case, the only way that GSR could have gotten on defendant was if he fired a gun or was near a gun when it fired.

¶ 100 Defendant also takes issue with the prosecutor's statement that a GSR test is positive when two or more GSR particles are present on a sample. That statement was incorrect—Chapman testified that a positive test result required that she find at least three GSR particles. Defendant fears that this misstatement "could have led the jury to conclude that more than one GSR swab was positive, instead of the true tally of three negatives against one positive." His fear is unfounded. When Chapman testified that the GSR tests of defendant's shorts and hands was "essentially negative," she explained that she reached that finding not because she only found two GSR particles, but rather because those samples contained particles "characteristic of background samples." Not only that, Chapman clearly testified that only one sample—defendant's shirt—tested positive. The prosecutor did not contradict that testimony during closing argument.

¶ 101 D. Jury Instructions

¶ 102 Next, we consider defendant's argument that we should vacate the 25-year sentence he received pursuant to the mandatory firearm enhancement. See 730 ILCS 5/5-8-1(a)(1)(d)(ii) (West 2010). Defendant's argument is two-fold. First, he argues that the jury instructions and verdict forms did not comply with the requirements of the sixth amendment as interpreted by the United States Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Second,

defendant contends that the trial court violated Illinois Supreme Court Rule 451 by giving a non-pattern jury instruction and failing to give verdict forms concerning the firearm enhancement.

¶ 103 We begin with defendant's constitutional claim. The sixth amendment provides that the criminally accused "shall enjoy the right to *** trial, by an impartial jury." U.S. Const., amd. VI. In *Apprendi*, the Supreme Court held that this right includes the requirement that, with the exception of the fact of a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum *** be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi*, 530 U.S. at 490. Defendant argues that the trial court violated his rights under *Apprendi* by failing to tender to the jury separate instructions and verdict forms concerning the firearm enhancement.

¶ 104 We rejected a similar argument under like facts in *People v. Aguilar*, 396 Ill. App. 3d 43 (2009). In *Aguilar*, the defendant's indictment alleged that he shot and killed a man and that during the commission of the offense, he discharged a firearm which proximately caused the man's death. *Id*. at 45. A jury found the defendant guilty, and the trial court sentenced him to 50 years' imprisonment, which included a 25-year sentence enhancement pursuant to the mandatory firearm enhancement law. *Id*. at 44, 59. On appeal, the defendant contended that the imposition of the 25-year enhancement violated *Apprendi* because the jury verdict did not include a specific finding that the defendant personally discharged a firearm during the offense. *Id*. at 59. We rejected the defendant's argument. We noted that the jury was specifically instructed that to find the defendant guilty of first degree murder, it had to find beyond a reasonable doubt:

> " 'First: That the defendant, or one for whose conduct he is legally responsible, performed the acts which caused the death of

> Brandon McClelland by personally discharging a firearm that proximately causes death; and
>
> Second: That when the defendant did so, he intended to kill or do great bodily harm to Brandon McClelland;
>
> or
>
> he knew that his acts would cause death to Brandon McClelland;
>
> or
>
> he knew that his acts created a strong probability of death or great bodily harm to Brandon McClelland.' " *Id*. at 59-60.

¶ 105 We explained that "[b]ecause the instructions provided to the jury at defendant's trial include the language 'personally discharging a firearm' and properly articulated the facts that were required to be proven beyond a reasonable doubt in order to apply the 25-year extension to defendant's sentence, the enhancement did not violate *Apprendi*." *Id*. at 60.

¶ 106 Like the instruction at issue in *Aguilar*, the first degree murder instruction given to the jury in this case clearly stated that, to find the defendant guilty, the jury had to find beyond a reasonable doubt that defendant personally discharged a firearm that proximately caused Anthony's death. While we agree the better practice would have been to separate the firearm enhancement instruction from the murder instruction, we hold that defendant's 25-year sentence enhancement did not violate his sixth amendment rights under *Apprendi*. See *id*. at 60; see also *People v. Hopkins*, 201 Ill. 2d 26, 39-40 (2002) (no *Apprendi* violation where defendant was sentenced to extended term sentence due to age of victim, despite fact jury did not receive

separate instruction on issue of victim's age, because the victim's age was included as an element of the underlying offense).

¶ 107 Even if there was an *Apprendi* error, defendant would still not be entitled to relief. *Apprendi* errors are subject to harmless error analysis, pursuant to which we must ask whether " 'it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.' " *People v. Thurow*, 203 Ill. 2d 352, 368-69 (2003) (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)). To conduct this analysis, we must consider the instructions defendant claims the court should have given. *Id*.

¶ 108 Defendant contends that the trial court should have given Illinois Pattern Instruction (IPI) Criminal 28.01, 28.02, 28.03, 28.04, 28.05, and 28.06. IPI 28.01 provides in relevant part: "[1] during the commission of the offense of the defendant *[***(personally discharged a firearm that proximately caused*** [death] to another person)]*." IPI 28.02 instructs that the defendant is presumed to be innocent of the alleged enhancing factor and that the State bears the burden of proving the existence of the enhancing factor beyond a reasonable doubt. IPI 28.03 defines various terms used in enhancing statutes. As relevant here, IPI 28.03 states "[a] person is considered to have 'personally discharged a firearm' when he, while armed with a firearm, knowingly and intentionally fires a firearm causing the ammunition projectile to be forcefully expelled from the firearm." IPI 28.04 is a concluding instruction providing the jury with additional guidance that it should consider whether the State has proved the enhancing factor beyond a reasonable doubt only if it has found the defendant guilty of the underlying offense. IPI 28.05 and 28.06 contain verdict forms.

¶ 109 At trial, the State presented overwhelming evidence to support an affirmative finding with respect to Illinois Pattern Instructions 28.01 and 28.03, the only instructions which actually

require a factual finding by the jury. As detailed above, the State presented two eyewitnesses who testified that they saw the defendant ride up to Anthony, withdraw a gun, and fire the gun. Furthermore, a medical examiner testified that Anthony's cause of death was a gunshot wound and his manner of death was homicide. Moreover, the overwhelming evidence shows that Anthony's murder was a premeditated act. Two witnesses testified that defendant threatened to kill the Cox brothers the week of the shooting, and Wright testified that defendant pointed the gun at Anthony before pulling the trigger. Under these facts, "it is clear that beyond a reasonable doubt that a rational jury would have found," had it been instructed as defendant claims he should have been, that Anthony's death was proximately caused by the discharge of a firearm that was triggered by defendant. *Thurow*, 203 Ill. 2d at 368-69.

¶ 110 We next consider defendant's argument that he is entitled to a new trial because the trial court violated Illinois Supreme Rule 451 by issuing a non-pattern instruction. Rule 451(a) provides:

> "Whenever Illinois Pattern Jury Instructions, Criminal, contains an instruction applicable in a criminal case, giving due consideration to the facts and the governing law, and the court determines that the jury should be instructed on the subject, the IPI Criminal instruction shall be used, unless the court determines that it does not accurately state the law." Ill. S. Ct. R. 451(a) (eff. Apr. 8, 2013).

¶ 111 Defendant did not object to the particular instruction at issue here. However, Rule 451(c) provides, "substantial defects are not waived by failure to make timely objections thereto if the interests of justice require." Ill. S. Ct. R. 451(c) (eff. Apr. 8, 2013). "The purpose of Rule

451(c) is to permit correction of grave errors and errors in cases so factually close that fundamental fairness requires that the jury be properly instructed." *People v. Sargent*, 239 Ill. 2d 166, 189 (2010). The rule is coextensive with the plain error doctrine contained in Supreme Court Rule 615(a). See *People v. Herron*, 215 Ill. 2d 167, 175 (2005). The test is satisfied when the erroneous omission of a jury instruction "creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *People v. Hopp*, 209 Ill. 2d 1, 8 (2004).

¶ 112 We begin by considering whether the trial court erred by issuing a non-pattern instruction. Rule 451(a) states that pattern instructions *shall* be used unless the court finds that a particular pattern instruction does not accurately state the law in a given case. Ill. S. Ct. R. 451(a) (eff. Apr. 8, 2013). "Shall" means the command is mandatory. See *People v. Singleton*, 103 Ill. 2d 339, 341-42 (1984); *Grossman v. Gebarowski*, 315 Ill. App. 3d 213, 221 (2000). Because the trial court gave a non-pattern instruction without formally finding that the relevant pattern instructions did not accurately state the law, the court committed error.

¶ 113 Having found instructional error, we must determine whether it was so severe that it threatened the fairness of defendant's trial by creating a serious risk that the jury did not understand the law. Such a finding is permitted only if the instructional error was "grave" or if the case was "so factually close that fundamental fairness requires that the jury be properly instructed." *Sargent*, 239 Ill. 2d at 189.

¶ 114 We have already explained that the evidence in this case was not closely balanced. Thus, defendant may prevail only if the error in this case was grave. This requires an inquiry analogous to the one we would make under the second prong of the plain error doctrine. See *People v. Keene*, 169 Ill. 2d 1, 32 (1995) (Supreme Court Rules 451(c) and 615(a) are construed

"identically"). Defendant argues that the instructional error in this case was grave because instructions 19 and 20 provided contradictory definitions of first degree murder, "the instructions did not instruct the jury on the burden of proof and presumption of innocence for the enhancements," and because the instructions "did not ensure that the jury believed beyond a reasonable doubt that [defendant] personally discharged a firearm."

¶ 115 We disagree. Instruction 19 stated:

> "A person commits the offense of first degree murder when he kills an individual if, in performing the acts which cause the death, he intends to kill or do great bodily harm to that individual
>
> or
>
> he knows that such acts create a strong probability of death or great bodily harm to that individual."

¶ 116 Instruction 20 (quoted at length *infra* ¶ 43) provided the jury with step-by-step factual findings it had to make to find defendant guilty. Among them was the requirement that the jury find that "defendant personally discharged a firearm that proximately caused death of Anthony Cox." Instruction 20 also specifically referred to the State's burden of proof. In addition, instruction 9 informed the jury regarding the presumption of innocence and the State's burden of proof. We therefore find that the instructional error was not "grave." See *People v. Layhew*, 139 Ill. 2d 476, 486 (1990) ("A written instruction that informs the jury of the presumption of defendant's innocence and the State's burden of proving defendant guilty beyond a reasonable doubt is a time-honored and effective method of protecting a defendant's right to a fair trial."). Accordingly, we reject defendant's argument that his 25-year sentence pursuant to the firearm enhancement should be vacated.

¶ 117 Separately, defendant argues that his counsel was ineffective for failing to object to instruction 20. Such a claim requires that the defendant establish prejudice. That defendant cannot do, for as we have explained, the outcome at trial would have been the same had the jury received the instructions defendant claims the court should have tendered.

¶ 118 E. Excessive Sentence

¶ 119 Finally, we consider defendant's argument that his 60-year sentence was excessive. The circuit court retains "great discretion" to "fashion an appropriate sentence within the statutory limits." *People v. Fern*, 189 Ill. 2d 48, 53 (1999). We will not disturb a sentence that is within the statutory guidelines unless the sentence constitutes an abuse of discretion. *People v. Gutierrez*, 402 Ill. App. 3d 866, 900 (2010). We will not find a sentence that is within the guidelines to be an abuse of discretion unless it is "greatly at variance with the spirit and purpose of the law, or manifestly disproportionate to the nature of the offense." *People v. Stacey*, 193 Ill. 2d 203, 210 (2000). Defendant's sentencing range was 45 years to life in prison. See 730 ILCS 5/5-4.5-20(a) (West 2012); 730 ILCS 5/5-8-1(a)(1)(d)(iii) (West 2012). Defendant's 60-year sentence was within the statutory guidelines. We therefore review defendant's sentence for abuse of discretion. *Gutierrez*, 402 Ill. App. 3d at 900.

¶ 120 Defendant offers two arguments as to why his sentence was excessive. First, citing *People v. Rickard*, 99 Ill. App. 3d 914 (1981), defendant argues that his 60-year sentence is a *de facto* life sentence which therefore "negate[s] any possibility of rehabilitation." *Rickard* is readily distinguishable. There, the defendant's rehabilitative potential was manifestly evident: the defendant was honorably discharged from the British army, he had an engineering degree, and he had a history of employment. *Id.* at 918-19.

¶ 121 *Rickard* aside, defendant's argument suffers from a more fundamental flaw. Every life sentence, *de facto* or otherwise, necessarily precludes the defendant from reentering the ranks of productive citizenship. If that alone was enough to render invalid a sentence of lifetime imprisonment, then no life sentence could ever be valid. That is not the law. Illinois courts have repeatedly sustained life sentences. See, *e.g.*, *People v. Smith*, 362 Ill. App. 3d 1062, 1091 (2005) (upholding life sentence for defendant convicted of first degree murder); *People v. Larsen*, 47 Ill. App. 3d 9, 31-32 (1977) (upholding 100 to 300 year sentence for defendant convicted of first degree murder).

¶ 122 Defendant next argues that the trial court failed to consider mitigating evidence. The mitigating evidence the judge purportedly ignored was as follows: (1) defendant suffers from depression and bipolar disorder; (2) defendant has had history of substance abuse problems; and (3) defendant was robbed and beaten by the Cox brothers months before the shooting and therefore was strongly provoked. Evidence of defendant's mental health problems and substance abuse was detailed in the presentence investigation report, and defense counsel discussed those issues at length during the sentencing hearing. The same goes for the alleged conflict between defendant and the Cox brothers. Defense counsel told the court that the Cox brothers "robbed and beat and held [defendant] at gun point, and kidnapped him in front of his own home," and the court stated that it considered "all hearsay presented and deemed relevant and reliable."

¶ 123 Where mitigating evidence is before the court, we presume that the court considered it. *People v. Markiewicz*, 246 Ill. App. 3d 31, 55 (1993). That presumption may not be rebutted merely by the fact that the court imposed a severe sentence despite the existence of some mitigating evidence. *Id.*; see *People v. Parker*, 288 Ill. App. 3d 417, 423 (1997) ("A lengthy sentence does not mean mitigating factors were ignored."). Here, the record shows that the trial

judge was presented with evidence or argument regarding all three mitigating factors which defendant claims the judge ignored. Moreover, we note that the State requested a sentence of 80 years, and defendant could have received a life sentence. Defendant's sentence was in the middle range of potential sentences he could have received, and was 20 years less than what the State requested. This suggests that the court did consider the mitigating evidence. See *People v. Powell*, 2013 IL App (1st) 111654, ¶ 39.

¶ 124 Finally, with respect to defendant's provocation argument, we note that this mitigating factor was not applicable based on the facts of the case. Courts have held that for the mitigating factor of provocation to apply, the provocation must be "direct and immediate." See, *e.g.*, *Powell*, 2013 IL App (1st) 111654, ¶ 36. In defendant's brief, he explains that the alleged attack by the Cox brothers took place months before the shooting. Accordingly, the alleged attack on defendant cannot be described as "direct" or "immediate" to the shooting in this case.

¶ 125 CONCLUSION

¶ 126 We affirm defendant's conviction and sentence.

¶ 127 Affirmed.