2017 IL App (3d) 150481-U

Order filed December 22, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
	)	Peoria County, Illinois.
Plaintiff-Appellee,	)	
	)	Appeal No. 3-15-0481
v.	)	Circuit No. 14-CF-0378
	)	
SEAN TYRONE WALLS,	)	The Honorable
	)	David A. Brown,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CARTER delivered the judgment of the court.
Justice Wright concurred in the judgment.
Justice O'Brien dissented.

ORDER

¶ 1 *Held*: (1) Defendant did not show plain error regarding the numerous acts of prosecutorial misconduct alleged by him; (2) the trial court did not err in declining to appoint defendant new counsel to represent him on his *pro se* posttrial claim of ineffective assistance of counsel.

¶ 2 Following a jury trial, the defendant, Sean Tyrone Walls, was found guilty of first degree murder (720 ILCS 5/9-1(a)(1) (West 2014)). Defendant's attorney filed a motion for new trial, along with a list of *pro se* grievances from defendant, which included a claim that his trial

counsel provided him with ineffective assistance. After a hearing, the trial court found there was no need to appoint new counsel and, subsequently, denied the motion for new trial. Defendant was sentenced to 50 years of imprisonment. Defendant filed a motion to reconsider, which the trial court denied. On appeal, defendant argues the State deprived him of a fair trial where, during closing and rebuttal arguments, the prosecuting attorneys argued facts not in evidence, misstated the evidence, misstated the law, and inflamed the passions of the jury. Defendant also argues the trial court erred in failing to appoint new counsel following his posttrial claim of ineffective assistance of counsel. We affirm the judgment of the trial court.

¶ 3 FACTS

¶ 4 Defendant was charged with two counts of first degree murder for shooting Derrick Booth, Jr., with a handgun on May 24, 2014. Booth's body was found on the front porch of a home located on Greenlawn Avenue, in Peoria, Illinois, where Booth had attended a party. Police recovered two 9-millimeter shell casings on or near the porch where Booth's body was found. Both casings were fired from the same unknown firearm. No firearms were recovered during the investigation of Booth's murder.

¶ 5 At defendant's trial, the victim's father testified that the victim, Booth, was 22 years old when he died. Booth's father last saw Booth on May 22, 2014, when he dropped off Booth's $852 income tax return money to Booth.

¶ 6 An officer, who had been dispatched to 813 Greenlawn Avenue following a call of a male being shot, testified that numerous people from the party were fleeing the scene when he arrived. When he arrived, there were about 8 to 12 people on the porch around Booth's body. Some people stayed, however, and police were able to take those people to the police station for questioning, including Latisha Bailey.

¶ 7 An autopsy of Booth's body revealed a gunshot wound to Booth's chest and scrapes on the back of his elbow, forearm, and knee. Personal items recovered from Booth at the hospital included $14 and a cellophane cigar wrapper. No drugs were recovered. A 9-millimeter was retrieved from Booth's body during the autopsy.

¶ 8 A. Britiss Burks

¶ 9 Britiss Burks, testified she is a triplet with two identical sisters, who were all born on May 25, 1992. On the evening of Friday, May 23, 2014, Britiss and her sisters were having a party to celebrate their upcoming 22nd birthday. Britiss invited her friend, Booth, to the party. Britiss testified that the party took place at the home of her uncle, Shondre Johnson, on Greenlawn Avenue. That evening Britiss and her sisters were hosting a party with their "younger 20's" friends. Britiss's 32-year-old aunt Crystal was also having a party at the same home, which had started earlier in the day. Crystal's friends were in their 30's and were not Britiss's friends. Britiss's friends stayed in a group together during the party, and the older "30 somethings" were in their own group together.

¶ 10 At the party, Britiss saw that Booth had a lot of money when he gave her some money for her birthday. Booth again pulled out his money of folded 100s and 50s in front of "everybody that was in the kitchen," including defendant. Booth also had about a half ounce of marijuana, which included blunts (cigars containing marijuana). Britiss testified that she heard defendant try to buy $10 worth of marijuana from Booth for $5, but Booth refused. Immediately thereafter, someone else walked into the kitchen and sold defendant some marijuana. Defendant was drinking and taking the drug ecstasy during the party.

¶ 11 During the party, Britiss left with Booth's friend, Andrew, to go on a walk and discuss Andrew's having a bad feeling regarding tensions building and his concern about wanting to get

Booth out of the party. When Andrew and Britiss returned to the house, Britiss heard females arguing outside and heard defendant and Booth "arguing on the porch" as she walked past them. She testified, "by the time I was turning around, I seen [*sic*] Booth trying to fight and then all I heard was a gunshot and [Booth] was on the ground." She did not see who shot the gun. She testified, "I just seen [*sic*] like Booth tussling and then when I turned around, like he was on the ground." She did not see the person with the gun.

¶ 12 Britiss testified, "it was like Booth was trying to get away for protection or whatever, so Booth was turning around or whatever; but he couldn't run because he was being held [by defendant]." Booth was not doing anything to the defendant. Britiss testified that Booth had walked out of the house like he was getting ready to leave. She could not say that she actually saw Booth get shot, but she saw him trying to get away, she heard the gun fire, and she saw Booth fall to the ground, after which everybody, including defendant, ran. Britiss heard two gunshots and then ran into the house. When she came back outside, Britiss's cousin was performing CPR on Booth. She did not see defendant anywhere in sight.

¶ 13 Britiss testified that she did not see Booth with a gun the entire night or ever in her life. That night, Booth was wearing a fitted "little shirt" that did not cover his belt loops. Britiss testified that it was not possible for Booth to have had a gun on him because, if he did , then "everybody would have seen it." She saw Booth walk on the porch, and she saw defendant follow and grab Booth when Booth was trying to leave. She testified, "[i]t was like Booth was trying to run."

¶ 14 Britiss did not remember seeing defendant with a gun earlier in the evening. She denied telling police that defendant "was getting into it with everybody and [defendant] pulled a gun out

right in the kitchen and said, 'I'll shoot the whole house up.' " Britiss testified that defendant was much bigger than Booth. Britiss also testified that she and Booth were "real, real close."

¶ 15 On cross-examination, defendant's attorney asked Britiss whether Booth was a drug dealer, noting that he had "100's and 50's in pockets." Britiss responded, "[Booth] only had 100's and 50's because of some tax money." Britiss testified that Booth was "not a drug dealer for real."

¶ 16 In her police statement, which had been video recorded, Britiss had indicated that about 1.5 hours before the shooting, there had been an argument over somebody trying to buy some weed. Britiss told police that Booth had indicated that he did not have any weed to sell and, if he did, he would not cut any deals. Defendant and Booth were arguing at that point during the party because defendant was offended that Booth would not cut any deals for weed. When Britiss walked up the porch after going for a walk, she heard people arguing and heard defendant say to Booth, "you alright little dude, you cool?" She told police that she then saw defendant shoot Booth in the chest and Booth fall to the ground. Britiss signed a photo line-up form on May 24, 2014, at 6 p.m., identifying defendant as the shooter by circling his photo and signing her name.

¶ 17 B. Jasmine Burks

¶ 18 Jasmine Burks, a 26-year-old family member of Britiss, testified that she had left the party but returned and was sitting in the front of the house in a car with her cousin, Nekia Bennett, around 2 a.m. or 2:30 a.m. on May 24, 2014. Jasmine ran into the house to grab a cigarette. As she walked past the porch to go into the house, she saw defendant and Booth arguing and heard defendant say "[s]omething about some money." Jasmine was in the house for three to five seconds. When Jasmine came back outside, she heard Booth say to defendant, "[y]ou're not going to get my money." Jasmine then saw that defendant had a gun, and she saw

defendant shoot Booth in the chest. When the prosecutor asked Jasmine where defendant pulled the gun from, she indicated that defendant did not pull the gun out from anywhere because he already had the gun.

¶ 19 On cross-examination, defendant's attorney asked Jasmine to describe what had happened when she came back out of the house. Jasmine indicated that defendant and Booth were on the porch, with "a bunch of people surrounding [them]." She indicated that Booth could not really go anywhere and defendant shot him.

¶ 20 Three days after the shooting, Jasmine contacted police regarding having witnessed the shooting of Booth. Jasmine was interviewed by police and was shown a series of photographs, from which she circled defendant's photograph. Jasmine did not personally know defendant, and they were not friends. She also did not know Booth.

¶ 21 C. Angela Warfield

¶ 22 Angela Warfield testified that she was 31-years-old and she was at the party for the Burks triplets. When asked why she was at the party and who she knew, Angela testified, "[p]retty much everyone." Around 2 a.m., Angela was playing cards in the living room with her boyfriend, Latisha Bailey, and Terrell Lobdell. Defendant's girlfriend, Lakisha Hinkle, was sitting next to Angela. Breanna Kelly was also in the living room. Lakisha had a Crown Royal bag in her hand with the strap around her wrist. Defendant walked up to Lakisha and said, "[l]et me get that." Lakisha passed defendant a black handgun from the Crown Royal bag, and then defendant left out of the back door. Two minutes later, Angela heard the shooting. She did not know how many shots had been fired. Lakisha and Breanna were in the living room with Angela when the shooting occurred. After the shooting, Lakisha's brother "bust[ed] back in the door with two other men." Angela went outside and saw Booth on the ground and a woman trying to

give him CPR. Angela did not see Latisha Bailey fire a gun and did not see defendant anywhere in sight by the time she had gotten outside to see what had happened.

¶ 23 Angela testified that she "knew of [Booth]" but that night was the first time she actually met him. Angela had previously known defendant, but not personally to the point of being able to testify to how defendant would normally act. Angela described defendant as acting "[d]runk" on the night of the party.

¶ 24 Angela testified that she had given a statement to police on the day of the shooting, but six days prior to defendant's trial she gave police another statement because she "wanted to make sure the truth got out." Angela testified that her original statement to police was not her truth but the truth of someone else and was support for someone else. Angela testified that she had come to court to tell what she had seen and what she knew.

¶ 25 D. Latisha Bailey

¶ 26 Latisha Bailey testified that she attended the triplets' birthday party on May 24, 2014. At 2:30 a.m., Latisha was playing cards in the dining room with Breanna Kelly and Angela Warfield. Lakisha was also in the room. Latisha saw Lakisha give defendant a black, "[s]mall hand-held" gun from a purple Crown Royal bag. There were 10 to 12 people on the main floor when that happened. After Lakisha passed defendant the gun, defendant went in the kitchen.

¶ 27 Latisha also saw Booth sitting in a living room chair near where she was playing cards. Latisha described Booth as looking like a little kid. Latisha testified, "He didn't fit in. He didn't look right [being] there." Latisha saw defendant speak with Booth twice in the living room and heard defendant say "something about two for 15." Booth responded by saying that he was not going to keeping giving out deals. Latisha testified that meant defendant was trying to get cannabis. Defendant did not respond to Booth but instead went back into the kitchen. Booth

went to the front porch to speak with a female, Apreley Randle, who had called Booth outside. Latisha testified, "there were only two females out there with him." About 45 to 90 seconds later, Latisha heard a gunshot.

¶ 28 As Latisha was going out to the front porch, she saw a man in a black t-shirt running across the street between two houses. The man ran "[d]iagonally from the house on Greenlawn across the street" and went between two houses. On the porch, Booth was shaking on the ground and Apreley was trying to give Booth CPR. Tequila Davis was also on the front porch. Latisha reacted and "shot toward the person who was running across the street." Latisha testified that defendant had been wearing a black t-shirt and "dark colors," and the man running across the street could have been defendant.

¶ 29 Latisha testified that she had known defendant for 10 years and that on the night of the party, defendant was drinking alcohol and doing pills. Latisha described defendant as acting "spaced out." Latisha testified that she had seen Booth with money during the party.

¶ 30 On cross-examination, defendant's attorney asked Latisha whether the State was offering her a deal of not charging her for firing twice at the man running away in exchange for her testimony. Latisha replied, "No." Defendant's attorney asked, "So the State hasn't offered you any deal not to charge you with reckless discharge of a firearm?" Latisha replied, "No."

¶ 31 E. Tracina Jones

¶ 32 Thirty-six year old Tracina Jones was at the party during the early morning hours of May 24, 2014. She knew Booth from around the neighborhood. Tracina was surprised to see Booth at the party and made small talk with him. Tracina also knew defendant from growing up with him. Tracina testified that she was friends with both Booth and defendant.

¶ 33 Tracina testified that she did not see defendant speaking with Booth during the party, but defendant had indicated that he had tried to get "some weed" from Booth and Booth "wouldn't give nobody 2 for 15, wouldn't give nobody no play for no weed or whatever." Two for 15 meant a "loud blunt," which was the best weed, different from a regular blunt, and cost $10. Tracina testified that defendant was asking Booth for a deal. Tracina did not see Booth with a gun. During the party, Tracina saw defendant with his girlfriend, Lakisha Hinkle, who was carrying around a Crown Royal bag.

¶ 34 Tracina testified she was at the front door about to leave when she heard a gunshot. When she had gotten to the door, defendant and Shondre Johnson were standing at the door, side-by-side, with their backs toward the door. Booth was facing them more than an arm's length away. Tracina testified that a small "commotion" was ensuing and Shondre was telling defendant, "Man, leave it alone. It's nothing." Defendant reached up to grab Booth, and Booth fell. Tracina testified that she had seen a "flash." The prosecutor asked Tracina to show the jury what she meant by her testimony that defendant had reached up to grab Booth, and Tracina demonstrated. Tracina testified that she did not actually see a gun in defendant's hand. She indicated that she just saw the light from the gun fire, defendant and Booth both fall down, and then defendant look back toward Tracina and run off. Tracina and Shondre ran into the house, and Tracina ran out of the back door and down the alley.

¶ 35 Tracina testified that she was drunk and high at the party. According to Tracina, Booth was not at the party to sell weed but if someone asked him for it, he sold it. She saw Booth give someone change for a twenty dollar bill but did not see him with a "wad of cash."

¶ 36 F. Dr. John Denton

¶ 37 Dr. John Denton testified that he performed the autopsy of Booth's body. Denton opined, to a reasonable degree of medical certainty, that Booth died from a gunshot wound to his chest. Booth had a single gunshot wound to the chest and smaller scrapes on his elbow, forearm, and knee, which were consistent with collapsing after being shot. Denton testified that there was no evidence of soot, gunpowder stippling, or tattooing on the Booth's t-shirt or on his skin around the gunshot wound, "so there was no evidence of any kind of close range firing."

¶ 38 Denton testified:

> "So, if I do not see things that come out of the barrel with the bullet such as that cloud of smoke or soot or particles of gunpowder that come out burning or unburned gunpowder that are smaller projectiles, usually a muzzle that's within 2 feet of the entrance wound or the shirt, then I will see those particles or that smoke or soot. I did not see that on Mr. Booth."

¶ 39 Denton opined that the gun that had caused the injury to Booth was greater than two feet away from Booth's body when it was fired. In tracing the gunshot wound through Booth's body, Denton opined that the bullet went from the front of Booth's chest and downward toward his left flank, "so it was basically front to back, right to left, and fairly sharply downwards by about 11 inches (Indicating)." A 9-millimeter bullet was recovered from Booth's body.

¶ 40 Denton reiterated that Booth's "[t]-shirt had no soot or stippling and no evidence of close range firing." The prosecutor asked if, hypothetically, Booth had been struggling "in hand to hand sort of combat over a gun, literally their bodies touching at the time the gun was fired, would any of your forensic evidence from autopsy support that factual hypothetical?" Denton responded that there was no evidence of "close range firing," so that the muzzle of the gun had to

be two feet away or greater when it was fired and "struggling over a gun is inconsistent with what [he] found."

¶ 41 The prosecutor also asked Denton if there was any evidence to support a hypothetical situation wherein Booth had pulled out the gun, the other individual grabbed the gun, and there was struggle over the gun when it went off. Denton responded that the muzzle had to be at least two feet away, which would be inconsistent with a person turning a gun on himself and having the angle of the bullet that had traveled through Booth's body. Denton indicated that knowing that muzzle had to be two feet away or greater and knowing the angle of the bullet, the gun would have had to be fired up by the ceiling to achieve the angle of the bullet that traveled through Booth's body if the two men were in a face-to-face struggle over the gun. Denton indicated that the angle of the bullet could have occurred if Booth was attempting to duck and run away.

¶ 42 Denton did not find any evidence on Booth's hands to indicate that Booth had fired a gun, although Denton testified that there is not always such evidence. Denton explained that he did not see evidence on the hands all the time, but when it was there it was "pretty clear." Denton confirmed there was no such evidence on Booth's hands.

¶ 43 On cross-examination, Denton testified that it was "possible" that if a weapon was extremely clean there may be no evidence of soot at the gunshot site, even if the gun was closer than 24 inches, but it was "for sure" no closer than 18 inches. Denton agreed that the angle of the trajectory could have happened if Booth had been sitting on the ground, "but, again, the muzzle ha[d] to be 2 feet away." Denton agreed with defendant's attorney that it would have been possible to obtain the angle of the trajectory of the bullet if there was a struggle for the gun with Booth's and the assailant's arms raised in the air and to the right, and the cleanliness of the

barrel and how far the barrel was from the skin would be variables in the amount of soot apparent on Booth. Denton indicated that a gun fired with medium caliber ammunition would require the muzzle to be within "about 2 feet to see close range firing."

¶ 44 On redirect examination, Denton confirmed that a 9mm bullet was recovered from Booth's body, which was a medium-caliber bullet. Denton concluded that from his experience with close range firing from a standard medium handgun, the gunshot to Booth must have been fired from at least two feet away.

¶ 45 F. Defendant

¶ 46 The 38-year-old defendant testified that he had been at the party since noon on May 23, 2014, and he had been drinking throughout the day. The party took place at the home of defendant's "close friend," Shondre Johnson. Defendant had never seen Booth prior to the day of the party. Booth had arrived at the party later in the evening. At one point during the party, Booth and defendant "bumped paths crossing one another and [they] had little biddy words." Defendant testified that the incident was not big, but they had "literally bumped shoulders and had words."

¶ 47 Defendant testified that a little while after he and Booth bumped into each other, defendant was "on the porch with a couple other people and defendant saw Booth coming back to the party from across the street and clutching his pocket." Defendant was on the porch and Booth walked by him and went into the house. Defendant testified that there were a lot of people on the porch and it was likely Booth did not see defendant. Defendant was informed that Booth was asking if anybody had seen "the tall dude with dreads," and defendant had dreads at that time. Booth came back outside, and defendant was able to slide back into the house past Booth. Defendant told "the man of the house" (presumably Shondre) that he was scared and thought

Booth had a gun. Defendant's friend (presumably Shondre) told Booth that he would have to leave if he had a gun because his kids were upstairs. Defendant testified, "this is something we do all the time, kicking and drinking at my man's house" and his kids are upstairs asleep.

¶ 48 Defendant testified that he was inside the house and thought Booth had left. Defendant did not feel comfortable anymore, and so he decided to leave. When defendant was exiting the house, he saw Booth sitting on the porch. Defendant and Booth "came face to face." Defendant did not know what was going to happen because he knew that Booth had gotten a gun and had been asking questions about defendant. No one else was on the porch because everyone had been told to go inside. Lakisha Hinkel and her sister, Breanna Kelly, were on the sidewalk. When Booth and defendant made eye contact, defendant said, "Man, we ain't got to have no problems, man." He said to Booth, "Man, I'm 38 years old." He told Booth the "little incident was nothing" and they did not have to resolve anything. Defendant testified that the more he tried to talk to Booth "the more arrogant and cocky [Booth] became" and then Booth "grabbed a gun, upped the gun, and [defendant] grabbed his arm; and [they] went to wrestling over the gun." The gun went off and defendant ran.

¶ 49 When asked what position Booth had been in when the gun went off, defendant indicated, "went to grab it, and all of a sudden our arms are up." Defendant testified that he was taller than Booth and he may have "overpowered" Booth. Booth was falling backward when the gun went off. When the gun went off, Booth fell and defendant ran away. Just one shot was fired from the gun. Defendant testified that he feared for his life when Booth had pulled out the gun. Defendant testified that he ran away because he did know what to do.

¶ 50 After running away, defendant stayed in an abandoned house. He did not know what to do or if his name was involved with the incident. Defendant contemplated trying to get away

before he knew Booth died, so he got rid of his clothes by setting fire to them and kicking them down the sewer. Defendant initially did not think anyone had seen the incident. When defendant finally talked to someone, he learned that Booth had died. Defendant testified that he called his brother to pick him up so he could turn himself in. On May 26, 2014, two days after the shooting, defendant's brother picked him up and drove him to the police station. Before going to the police station defendant changed into clothes his brother had brought to him and cut his dreadlocks off with wireless clippers his brother had brought to him.

¶ 51 Defendant testified that he did not have a problem with Booth over marijuana and he never saw that Booth had money. Defendant described Booth as being very "mouthy" at the party toward defendant. When they bumped into each other, Booth told defendant to watch where he was going. Defendant testified that he did not know anything about a Crown Royal bag. Defendant described the gun that Booth pulled out as a small black gun. Defendant did not know what happened to the gun after Booth was shot.

¶ 52 Defendant testified that on the night of the party, he was wearing a purple t-shirt and army fatigue shorts. He testified that he was not wearing black pants and a black shirt. A photo of defendant on the night of the party showed that defendant was wearing a purple shirt and that he had short dreadlocks.

¶ 53 On cross-examination, the prosecutor asked defendant if he made two phone calls shortly after the shooting at around 3:20 a.m. Defendant denied making the calls or having a working phone on him when he was hiding out. Defendant testified that when he went to the police station he had a non-working phone. He testified the phone the prosecutor was showing him that indicated two calls were made at around 3:20 a.m. after the shooting was not his phone and was

not the phone he had brought with him to the police station. Defendant testified that on Monday, May 26, 2014, he paid a man on the street $2 to use the man's phone to call his brother.

¶ 54 The prosecutor asked defendant on what street he put his clothes down the sewer and defendant answered, "I have no idea what street it was." The prosecutor asked defendant if he set his clothes on fire on the street or on the sidewalk, and defendant answered, "It wasn't in the middle of the street, no." The prosecutor asked defendant if he was wearing something else when he did so, and defendant answered, "I had on my boxers, shorts. I had on shorts under there." The prosecutor asked if his shorts were "boxer shorts," and defendant answered, "And some basketball shorts under there." The prosecutor asked if defendant went out to the sewer in his "boxers," and defendant answered, "Yeah."

¶ 55 The prosecutor asked defendant if he was claiming that Booth had walked across the street from the party and went into a green house. Defendant answered, "I don't know which house he went to. It was across the street." The prosecutor asked defendant if he told police that Booth had gone into a green house, and defendant answered, "I think it was green." The prosecutors asked, "Well, that's what you described at the time, isn't that right?" The defendant said, "Yeah." The prosecutor asked if defendant had circled the house on a photo of the street when interviewed by police, and defendant answered, "Yep. I remember that. Yeah, I did." On a video clip of defendant's interview with police, defendant told police that he and Booth were "close together" and "standing right before each other face to face" and struggled with the gun at Booth's chest.

¶ 56 On re-direct examination, defendant testified about the struggling for the gun and demonstrating the struggle by reaching his arm above his head. Defendant testified that he did

not know at what point the gun went off during the struggle and it was possible the gun went off when his arm was extended up.

¶ 57 H. Lakisha Hinkle

¶ 58 Lakisha Hinkle testified for the defendant. She indicated that she had been dating defendant for five years. Lakisha was at that party on May 24, 2014, at 2:20 a.m. She testified she was outside in front of the house when the gun went off. She testified that she was not inside at the dining room table. Lakisha testified that during the party Booth was loud and obnoxious and seemed very intoxicated. Lakisha testified that she had been playing cards at the dining room table but when defendant indicated that he was ready to go home, she stepped outside with her sister and waited for him to say his goodbyes. Lakisha was not aware that defendant wanted to leave the party because he was scared. Lakisha indicated that defendant was not carrying a gun on the night of the party and she did not slip him a gun from a Crown Royal bag.

¶ 59 Lakisha indicated that when she was standing outside she saw Booth go into a house across the street on the corner and then come out of the house and back to the party "pretty quickly" with his hand in his pocket. She thought Booth had "a gun or something" in his pocket. According to Lakisha, a few seconds after Booth returned to the porch, defendant came outside and said to Booth, "You all right, little dude? Woo woo." Lakisha testified that after defendant made those comments, Booth "just snapped out." Lakisha testified that Booth said, "F you, n—" and reached in his pocket and pulled out what appeared to be a gun. Defendant reached for the gun. Defendant and Booth wrestled over the gun, and a gunshot went off. A couple of seconds later, there were two more gunshots.

¶ 60 Lakisha ran away to her "sister-in-law's" home. She resided there for "a couple months or so after that." Lakisha denied having any contact with defendant after the shooting, and

denied trying to contact him before she went to the police station on May 27, 2014, the day after defendant had turned himself in.

¶ 61 Lakisha testified that she did not speak to defendant while he was hiding out between May 24, 2014, and May 26, 2014. After defendant went to jail, Lakisha had spoken with defendant 290 times via phone and 261 days had passed since the incident. She also visited defendant in jail a lot and gave him a lot of money. Lakisha denied ever speaking with defendant about the shooting. Lakisha testified that she loved defendant and they made plans for after the trial if he were found not guilty because it was clear to her that defendant had acted in self-defense.

¶ 62 I. Breanna Kelly

¶ 63 Breanna Kelly testified that she was the sister of Lakisha Hinkle. Breanna had known defendant for seven years and did not want to see him in trouble. Breanna was at the party when Booth was shot. Breanna testified that around 2:30 a.m., she was outside in the front of the house near the stairs leading up to the porch. Defendant's attorney asked Breanna, "Were you with anybody?" Breanna answered, "Yes, my sister." He asked Breanna if she saw anybody on the porch and she answered, "it was a couple of other people," but she did not who they were.

¶ 64 Breanna testified that she saw Booth leave and then come back to the party. She testified that Booth had gone toward a house "catty-corner by the stop sign of Ann Street." Booth came back, seemingly angry. He was walking back to the party with his right hand in his pocket like he had something. Breanna testified that she saw Booth pull out a gun. Defendant and Booth were "tussling" for the gun for a minute or two. Booth hit the ground, and there was a loud "pop." After a couple seconds there were two more shots fired, so she took off. Breanna

testified that defendant did not have a gun at the party and she never saw a Crown Royal bag with a gun in it. Breanna went to the police on May 27, 2014, and gave a statement.

¶ 65 On cross-examination, Breanna confirmed that she had a good, close relationship with defendant. Breanna denied telling police that Booth went to a car to retrieve something. She denied having marked the location of the car on a photo of the street during her police interview. She acknowledged her initials on a document depicting an "x" in the street to indicate where the car was located but denied having made the "x" during the police interview. When the prosecutor asked Breanna where Jasmine and Britiss were when the shooting happened, Breanna testified that she did not recall.

¶ 66 J. Laharold Washington

¶ 67 Laharold Washington testified as a rebuttal witness for the State. He testified that he was currently incarcerated in the Department of Corrections. Laharold had been in jail with defendant, who was Laharold's cousin. Laharold testified that defendant told him about the shooting of Booth. Defendant told Laharold that he was doing pills and drinking most of the day of the shooting. Defendant told Laharold that Booth had bumped into defendant and they had a "heated conversation," after which "Shondre, whose house it was, came and broke them up from arguing or whatever." Laharold indicated that defendant had said that he went onto the porch and saw Booth. Defendant thought to himself, "damn, this the dude I just got into it with" and walked up to Booth and told him that they needed to squash the bullshit argument they were having because that was not for them. Defendant told Laharold that he and Booth started arguing again and then defendant "upped" his gun. Laharold testified that when a person used the term "upped" it meant that the person pulled it out from wherever it was. Laharold indicated that when defendant pulled out his gun, Booth tried to stop defendant by lunging at defendant

and that was when defendant shot twice. After defendant shot Booth, he stood there because he realized what he had just done and then someone said to defendant, "Man, what the fuck you doing? Get the fuck out of here." Defendant took off running and then "hid out."

¶ 68 Defendant told Laharold that he got a call from his brother, who told defendant that police were "kicking in doors looking for him and that he needed to turn himself in." Defendant did not tell Laharold what he did with the gun or where he hid out. When Laharold asked defendant what he was going to do if he went to trial, defendant indicated his defense was going to be self-defense by saying that Booth had "upped" the gun, defendant went for it, and the gun went off when they were "tussling over the gun." In exchange for his testimony, the State agreed to dismiss one of Laharold's pending unlawful possession of a controlled substance charges.

¶ 69 K. Linda Thomas

¶ 70 Linda Thomas also testified as a rebuttal witness for the State. Linda testified that she lived in the home that defendant had indicated to police that Booth had entered to retrieve a gun. Linda's home has a screened-in front porch. On the night of the party, Linda went to bed at 10:30 p.m. She had locked both the exterior screen door of the front porch and the front door to her home and both doors were locked when she awoke the next morning. Linda did not know Booth, and there was no reason that he would ever be in her home.

¶ 71 L. Detective Amanda Chalus and Detective Matthew Ray

¶ 72 In rebuttal for the State, Detective Amanda Chalus testified that in his police statement, defendant indicated he saw Booth go across the street from the party to a green house with an enclosed porch and retrieve a gun. Chalus testified that during the interview, defendant identified the house on an aerial printout (exhibit 29) by circling the house. A video clip of defendant's interview depicting defendant circling the green house on exhibit 29 was played in

court. Chalus testified that the house that had been identified by defendant belonged to Linda Thomas. Chalus testified that defendant had a phone with him when he came into the police station that he had indicated was his phone, which was presented in court and marked as exhibit 22. Chalus also interviewed Breanna, who had indicated that Booth went across the street from the party to a four-door, black car (not a house) to retrieve a gun. Breanna had marked on exhibit 31 where the car had been parked on the street in her interview with Chalus. Breanna indicated that Booth was holding the gun in his left hand when he walked back to the party. She also indicated that when Booth and defendant were "tussling" over the gun "they were so close they were touching." Chalus also interviewed Lakisha, who had indicated that Booth went across the street to retrieve a gun, but she identified a house next to the home defendant had indicated. Lakisha also told Chalus that when Booth and defendant were tussling they were so close they were touching.

¶ 73 In cross-examination of Chalus by defendant's attorney, Chalus confirmed that the house Lakisha had indicated Booth went to retrieve the gun was a white house with a screened in front porch next to the one identified by defendant. Chalus also confirmed that defendant, Breanna, and Lakisha all indicated that Booth went across the street in a diagonal direction southeastward.

¶ 74 Detective Matthew Ray testified that the cell phone defendant had when he arrived at the police station was marked as exhibit 22 in court. Ray recognized the phone because he had tagged it with his initials, his badge number, and "the original date." Two search warrants were executed to retrieve the information from the phone. Ray recorded on video the screen of the phone as he scrolled through its contents. Information extracted from the phone indicated that two phone calls had been made to or from the phone on May 24, 2014, to or from the same ten-digit phone number ending in 52 at 3:25 a.m. and 3:20 a.m. Ray made screen shots of the

activity on the phone and those photographs were introduced into evidence as exhibits 23 and 24. Ray was asked whether there were any other phone calls after those calls indicated on the phone, to which Ray responded that he had looked for additional calls but did not see any.

¶ 75 On cross-examination, defendant's counsel asked Ray if he could detect the duration of the calls. Ray indicated the duration of the calls was zero seconds, so there appeared to be no conversation.

¶ 76 M. Closing Arguments

¶ 77 In closing arguments the prosecutor argued that Booth was "a little kid, like a baby," who was out of place sitting in the corner while a bunch of ladies played cards. Booth was wearing a white t-shirt and camouflage shorts celebrating the triplet's birthday. Defendant, on the other hand, "was feeling large, big boy, big 38-year-old man with all of his buddies at the house of his best friend," who was hyped up on pills and drinking alcohol, and this little outsider dared to stand up to him in front of his friends. The prosecutor argued that Booth would not sell defendant "a 2 for 15 play" because he did not need to and that was not the reason Booth was at the party, "but, boy, did that offend the defendant." The prosecutor argued that in the early morning hours of May 24, 2014, Britiss started getting nervous and Booth's friend (Andrew Wright) wanted to speak with her about getting Booth out of the party. The prosecutor argued that Britiss saw words exchanged between Booth and defendant as Booth was trying to leave the party and defendant reached or grabbed toward defendant. The prosecutor stated:

> "Now, we remember by looking at the videotape we played that that night [Britiss] told police on the video that defendant, Mr. Big Shot over here, confronts [Booth] on the porch about the money again. How dare this little kid have this

money, this tax return money that he likely had in his pocket, and he shoots her friend. And she shows on that video, she grabs her chest, and he falls."

¶ 78 The prosecutor stated that Jasmine was in a car out in front of the party and went inside to get a cigarette. The prosecutor argued:

"[Jasmine] hears a verbal confrontation on the porch. She hears the defendant. Again, she hears the defendant say something about taking the money. Again, how dare this young outsider stand up to the defendant. You can't take my money. Feeling big in front of his friends at his friend's house where he hangs, he pulls out his gun and he shoots Derrick Booth.

And, remember, even the witnesses said the defendant's own friends were trying to diffuse the situation, Tracina tells that Dre, who's like a brother, Shondre, the guy that owns the house, [says] leave it alone. Leave it alone. But right at that moment, leave it alone to the defendant, leave it alone, she sees the defendant reach up and then she sees the muzzle flash. And Tracina, she had no skin in this game. She's friends with both men."

¶ 79 The prosecutors continued by arguing the only witnesses that indicated that Booth was the person with the gun were defendant, his girlfriend (Lakisha), and his girlfriend's sister (Breanna), but "they can't even get it straight." The prosecutor argued that the three defense witnesses did not know to which house Booth went to in order to get the gun or in which hand Booth was carrying the gun. The prosecutor argued that, on the other hand, the other people at the party testified defendant got a gun from Lakisha, who had produced the gun from the Crown Royal bag. The prosecutor stated:

"[Kisha is] willing to hold [defendant's] gun until he needs it, and that's exactly what she did. And, again, this occurred in front of a number of people, people who also have no skin in this game, people who know both these men."

¶ 80 The prosecutor argued that defendant's witness, Breanna, testified that other people were outside at the time of the shooting but she did not know who they were. The prosecutor stated:

"Okay. Breanna. She says when asked specifically by [the prosecutor] tell me who's outside to see this happen. Besides myself, she says, there were a couple other people outside and I didn't know them. Hmm. I think she left out her sister. Where was Kisha? Well, we know where Kisha was. She was inside right where Latisha Bailey and Angie Warfield and the other people playing cards said she was at. She was inside playing cards at the time of the shooting.

Then we ask Kisha. [The prosecutor] asked Kisha, well Kisha, who was outside to see the shooting? Well, the ones out there was [Booth], the defendant, her, and another guy in the corner. Hmm. Oops. She left off Breanna."

¶ 81 The prosecutor argued that Lakisha and Breanna did not testify to seeing Jasmine Burks or Britiss Burks walk up to the porch and did not testify to seeing Tracina. The prosecutor argued that Breanna and Lakisha were not correct about who was outside at the time of the shooting because they were not outside at that time.

¶ 82 The prosecutor argued that those who had interacted with Booth on the evening of the party did not see him with a gun. The prosecutor contended, "[t]he worse thing [Booth] did was have a wad of money and some weed, some blunts." The prosecutor argued that the only witnesses who put a gun in Booth's hand were the defendant and those that wanted a future with him, so they tried to explain away defendant's "crazy, unjustified, out of control behavior" that

everyone had witnessed and his own friends had tried to diffuse. The prosecutor indicated that the problem with defendant's justifications, and those of his witnesses, was that their testimony did not "fly" with the other evidence or the law.

¶ 83 The prosecutors reviewed the jury instructions and argued that defendant's claim of self-defense was not supported by the evidence. The prosecutor further argued that defendant intentionally shot Booth and his behavior after the shooting was not that of a remorseful man. She stated:

> "He burns his clothes in the street. Naked? Well, that's what he wants you folks to believe. Well, then when he realizes how that sounds bad, then maybe he's in the house but then he's kicking them down a sewer but then he can't tell you where he did it. *** [H]e can't remember where he's at, what street he's on, what abandoned house he kicked in and lived in for two days like a recluse. He can't remember where he got his little razor, and he pays somebody two bucks to use their phone. That is incredible."

¶ 84 The prosecutor argued that the State had "witnesses come forward" that did not want to be testifying at trial. The prosecutor stated:

> "Some of them [the witnesses] are friends with the defendant. Many of them have nothing they owe to [Booth]. Maybe—you'll have to judge the ones that think they owe something to the defendant, but, nonetheless, part of that is judging their credibility.
>
> Many of—some of our witnesses by their own admission have even sat at that table before (Indicating). But they came here to tell you what happened because it was the right thing to do, and they saw things from a lot of different

perspectives; and we talked about that at the very beginning. Some were on the porch. Some were in the doorway. Some of them were in the living room. Some were at the table.

But what is consistent throughout this case? That DJ [Booth] was not going to sell weed to the defendant but the defendant saw the weed and the money that DJ [Booth] had on him, the defendant was not happy that he was being dissed by DJ [Booth], and he wouldn't let it go. *** [I]f he couldn't buy it, he was going to take it, and we know the defendant shoots DJ [Booth] and flees. ***

*** And the science tells us this could not have happened the way defendant and his girls describe it. *** What [Booth] couldn't say, he left on his body or I should say what isn't on his body because you see what science tells us, Dr. Denton tells us, is that [Booth]—that the story the defendant tells could not have happened by the science because the science tells us that there was no soot or abrasions or bruising or injury to any of [Booth's] hands. I mean, if we're struggling over the gun and I'm Derrick Booth and I pull the gun out like this and the defendant grabs the gun and we're struggling, somehow Derrick Booth by maybe he's triple jointed, maybe he can turn his whole hand around, place the gun in his chest, and pull the trigger (Indicating). I don't know. That's ridiculous. And, frankly, Dr. Denton said it's ridiculous. In all his years when there is a struggle for the gun, he told you there will be evidence of soot, abrasions, bruising, something on the hands that struggled.

We also know that there is no soot on the T-shirt that Booth was wearing. We know there is no soot or stippling on Booth's skin which would be consistent

with a close range shot as described by his girls right in the chest. They're just touching when the gun goes off and by the defendant which I submit changed after Dr. Denton testified to a fight up here and really long arms (Indicating). But, nonetheless, the science says there's no soot and there's stippling. This was not a close range shot.

And the trajectory, that is the most interesting piece of science I submit. The trajectory of this bullet is consistent with someone shot at such an angle that there is no way Derrick Booth was standing and struggling with his assailant at the time he was shot. No way. As Dr. Denton said, he had to be shooting from the sky and more than 2 feet from where it entered D. Booth's body."

¶ 85 In response, in his closing argument defendant's attorney indicated:

"And before I go over the State's witnesses, I have to ask can anybody honestly sit here and believe that any of those witnesses were credible because I would submit to you they were not?

Britiss Burks *** did not see either one of them with a gun. *** She's friends with [Booth]. She admitted that on the stand, and if she saw something, wouldn't it be in her best interest to come forward and say what she saw? And she has changed her story so many times that I don't even know what to believe. It's completely incredible.

Next, we have Jasmine Burks. At first [she] claims she didn't see anything. *** She testifies that she witnessed my client shoot [Booth], says there were several people on the porch, but, apparently, she's the only one who witnessed this.

*** And how coincidental. Miss Burks gets out of her car at the very time of the shooting takes place to get a cigarette. You saw her demeanor on the stand. She wouldn't look at any of you guys in the eyes. I submit to you that's because she is lying and she in not credible.

* * *

As far as the rest of Angela Warfield's testimony, I couldn't make sense of it. I don't know if any of you could but, certainly, totally incredible.

Latisha Bailey, Class 3 forgery. Crime of dishonesty. Felony. Class 1 manufacturing delivering a controlled substance. Class 3 retail theft. Crime of dishonesty. Really credible? Is this someone who has impeccable credibility with you? I submit to you no.

One thing I do believe about Latisha's story is that she went out on the porch and she fired twice at the suspect who was running away from the house, and, coincidentally, there were two casings found fired from the same gun. Two shots, two casings. ***

* * *

Tracina Jones admits she was so intoxicated she didn't even know what she was wearing. *** She testified she didn't see anything in [defendant]'s hands, no gun, saw some grappling between [defendant] and DJ [Booth], heard one shot, did not see who shot, and then ran. This gives us no insight into what happened. None of the State's witnesses give us any insight into what happened."

¶ 86 In rebuttal, the prosecutor admonished jurors to use their common sense and everyday experiences to determine the facts and weigh the evidence. She argued that the circumstantial

evidence indicated that defendant shot and killed Derrick Booth in an unprovoked manner. The prosecutor argued:

> "The witnesses in this case were not necessarily happy and looking forward to appearing, a lot of dynamics in that different people are friends with different people. And one of the things when I look at the case and decide who to believe and not believe, I think, well, why would the 30 something ladies, Latisha, Miss Jones, Angela Warfield, why would they, when they're [defendant's] friends, come into court and testify?"

¶ 87 The prosecutor argued that Jasmine was crying as she testified to witnessing "defendant aim his gun and shoot Derrick [Booth]." The prosecutor indicated that when she asked Jasmine to demonstrate what defendant did, "[Jasmine] went like that and pointed right at me (Indicating)." The prosecutor also argued that Booth had turned and ducked when he saw defendant's gun, which accounted for the trajectory of the bullet through Booth's body. The prosecutor argued that Angela's testimony did, in fact, make sense in that she testified that she saw Lakisha pass defendant a gun and Latisha too had seen Lakisha give defendant the gun from a Crown Royal bag. The prosecutor argued that defendant had the gun. The prosecutor argued that defendant had originally told police the gun was in Booth's hand six inches from his body but then testified at trial that the gun was in the air in order to account for Denton's testimony that the gun must have been fired 18 to 24 inches away from Booth's body.

¶ 88 The prosecutor also argued:

> "Well, when the defendant is confronted with the facts, he changes his story. The defendant told the police, and you heard him say it on the video clip that was also played this morning, that DJ went into the green house across the

> street, and he circled the house quite animated for the police officer. However, when he testified, he said, I didn't say that until then we played the video. So why does he have to lie now? Well, [the owner of that house] says it's not possible for [Booth] to have gotten into my house. I keep my porch door locked. I don't know DJ Booth. Yet, the defendant wants us to believe that this young man put, took his gun and hid it in somebody's else's house. I mean it's just ridiculous."

¶ 89 N. Finding of Guilt, Posttrial Motions, and Sentence

¶ 90 Following jury deliberations, the jury found defendant guilty of first degree murder. Defendant's attorney filed a motion for new trial. In addition to arguments made in the motion for new trial, defendant's attorney submitted a *pro se* list of issues raised by the defendant. Defendant's *pro se* list indicated, *inter alia*, "ineffective council [*sic*] by my lawyer" and the detectives had lied about the cell phone because it was not defendant's cell phone and defendant had never seen that phone in his life.

¶ 91 The trial court noted that many of the issues raised in defendant*'s pro se* document were included in defense counsel's motion for new trial. The trial court indicated that defendant's had raised a claim of ineffective assistance of counsel but the trial court could not tell if the remainin*g pro se* issues were alleged in support of the ineffective assistance claim or if defendant had "something else that [was] separate from that." Defendant indicated that his ineffective assistance claimed stemmed from the State disclosing Tracina as a witness a few days before trial. Defendant's attorney indicated that he spoke with defendant about Tracina being allowed to testify and informed defendant that the State was agreeable to giving defendant a continuance, but defendant did not want the trial pushed back any further and wanted to proceed to trial.

Defendant disagreed that his attorney said anything about continuing the trial to another date. The trial court asked defendant if he had "any other contentions." Defendant responded that "a lot of people" gave statements prior to trial that were inconsistent to their trial testimony. The trial court noted that issue was addressed in defense counsel's motion for new trial. The trial court asked defendant, "Anything else?" Defendant argued that he had never seen the cell phone that was presented in court and that phone was not the phone that he had with him when he turned himself in to police. Defendant indicated that calls were made from that cell phone on May 26th and 27th, after defendant was in custody when it was impossible for him to have used that phone. Defendant's attorney indicated that the prosecutor had laid the foundation for the cell phone and there was no reason to believe that the prosecuting attorneys would have risked their law licenses to put a fake cell phone into evidence. The prosecutor indicated that she did not "totally understand the cell phone argument" but the trial court knew the record and evidence that had been presented from the phone. The trial court found there was no need to appoint new counsel because defendant's claims of ineffective assistance of counsel were based primarily on matters of trial strategy. The trial court denied the motion for new trial filed by defendant's attorney and denied defendant's *pro se* posttrial claims.

¶ 92 The trial court sentenced defendant to 50 years of imprisonment. Defendant filed a motion to reconsider, which the trial court denied. Defendant appealed.

¶ 93 ANALYSIS

¶ 94 I. Prosecutorial Misconduct During Closing Arguments

¶ 95 On appeal, defendant argues he is entitled to a new trial because the prosecutor engaged in prosecutorial misconduct throughout closing and rebuttal arguments by repeatedly arguing facts not in evidence, misstating the nature of the evidence, misstating the law, vouching for the

credibility of witnesses, and inflaming the passions of the jury. Defendant contends that the two prosecutors in this case "engaged in a pervasive pattern of misconduct during closing argument, which substantially prejudiced [him]." Defendant argues approximately 27 errors were made by the prosecutor during closing and rebuttal arguments. The State contends that defendant's claims of improper remarks by the prosecutor during closing arguments are meritless in that the remarks were taken out of context by defendant or were properly made based on reasonable inferences from the evidence. The State further claims that any misstatements by the prosecutors were *de minimus*.

¶ 96 A. Plain Error Review

¶ 97 Defendant acknowledges that he failed to preserve the issue of the prosecutor's alleged improper comments by failing to object at trial and by failing to include the issue in his motion for new trial. See *People v. Enoch*, 122 Ill. 2d 176, 187 (1988) (to preserve a purported error for consideration by a reviewing court, a defendant must object to the error at trial and raise the error in a posttrial motion). However, defendant requests that this court review the prosecutor's comments for plain error. The plain-error doctrine allows forfeited errors that were unpreserved to be considered by a reviewing court when either: (1) the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant; or (2) the error was so fundamental and of such a magnitude that it affected the fairness of the trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence. Ill. S. Ct. Rule 615(a) (insubstantial errors shall be disregarded but substantial errors (plain errors) may be noticed despite not having been brought to the attention of the trial court); *People v. Sebby*, 2017 IL 119445, ¶ 48. Under either prong of the plain error doctrine, the burden of persuasion remains with the defendant. *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005).

¶ 98 In this case, the evidence was not closely balanced. The evidence showed that defendant and Booth had an altercation during the party, defendant had been offended by Booth refusing to give him a deal on the sale of marijuana, defendant asked Lakisha for a gun, Lakisha gave defendant a gun, and Booth was shot minutes later. Britiss testified that Booth did not have a gun and everyone would have seen it on him if he did. She also testified that Booth was trying to get away when defendant grabbed him and then she heard a gunshot and saw Booth fall to the ground. Jasmine testified that defendant was arguing with Booth about money and defendant shot Booth in the chest. Tracina testified that defendant reached for Booth, there was a flash, and Booth fell to the ground. Tracina confirmed that defendant and Booth had been standing more than arm's length away from each other when the shooting occurred. Denton testified that Booth had to have been shot from at least 18-24 inches away due to the lack of stippling and soot on Booth and the trajectory of the bullet through Booth's body. According to Denton's testimony, defendant's scenario of Booth being shot during a struggle for the gun was inconsistent with the evidence. While Denton testified that it was possible that the Booth could have been shot during a struggle if the gun had been raised up to the ceiling, there were not any witnesses, other than defendant, who indicated that defendant and Booth had struggled with their arms raised above their heads. After the shooting, defendant ran away and hid out for two days, until police released a statement in search of defendant. Right after the shooting, Britiss and Jasmine identified defendant to police as the person who shot Booth. Defendant described Booth as being "mouthy" toward him during the party and acknowledged that they had "words." Defendant admitted that he was hiding out after the shooting and admitted that he disposed of his clothes and cut his hair. Defendant, Lakisha, and Breanna had testified to seeing Booth walk across the street to retrieve a gun. Defendant indicated that Booth went into a home across the

street to retrieve the gun, but the homeowner, Linda, testified that it was not possible for Booth to have retrieved anything from her from home because both her screened-in porch and front doors were locked at that time. Breanna told police that Booth went to a car to get the gun, while Lakisha said he went to a house across the street, but identified a different house from the one defendant had identified. Witnesses testified that Lakisha and Breanna were inside the house during the shooting; not outside as they had claimed. No witnesses, other than defendant, testified to seeing Lakisha or Breanna outside at the time of the shooting. Laharold testified that defendant admitted to pulling out the gun and shooting Booth. Laharold also indicated that defendant said he would claim self-defense and say that Booth had pulled out the gun and the gun went off while Booth and defendant tussled over it. Our review of the evidence indicates the evidence against defendant was overwhelming and was not closely balanced, so any alleged errors made by the prosecutor during closing arguments cannot be reviewed under the first prong of a plain error review. See *Sebby*, 2017 IL 119445, ¶ 48.

¶ 99 Before we determine whether to continue under the second prong of plain error, we will determine which, if any, of the approximately 27 alleged improper remarks were actually clear or obvious errors. *Id.* ¶ 49. Defendant has indicated in his brief on appeal, and the State agrees, that we should review *de novo* the question of whether prosecutorial misconduct during closing arguments was substantially prejudicial to a defendant. See *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007); *People v. Pierce*, 226 Ill. 2d 470 (2007); but see *People v. Maldonado*, 402 Ill. App. 3d 411, 421-22 (2010) (the standard of review for closing remarks is an unsettled issue stemming from an apparent conflict between two supreme court cases (citing *Wheeler*, 226 Ill. 2d at 121 (the question of whether statements made by a prosecutor at closing argument were so egregious that a new trial is warranted is a legal issue reviewed *de novo*)); and *People v. Blue*, 189 Ill. 2d

99, 128 (2000) (the substance and style of closing argument are within the trial court's discretion, and will not be reversed absent an abuse of discretion; concluding that the trial court abused its discretion in allowing certain prosecutorial remarks in closing). This court agrees that whether comments made by the prosecution in closing argument were so egregious as to warrant a new trial is a question of law that is reviewed *de novo*. *People v. McCoy*, 378 Ill. App. 3d 954, 964 (2008).

¶ 100 A criminal defendant is entitled to a fair, orderly and impartial trial, regardless of his guilt or innocence. *Wheeler*, 226 Ill. 2d at 121. "The purpose of closing arguments is to give the parties a final opportunity to review with the jury the admitted evidence, discuss what it means, apply the applicable law to the evidence, and argue why the evidence and law compel a favorable verdict." *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005) (quoting T. Mauet & W. Wolfson, Trial Evidence 439 (2d. ed. 2001). Prosecutors are afforded wide latitude in making closing arguments. *Wheeler*, 226 Ill. 2d at 121. In closing, the prosecutor may comment on the evidence, to include making any fair, reasonable inferences the evidence may yield. *Nicholas*, 218 Ill. 2d at 121. In reviewing comments made during closing arguments, a reviewing court asks whether the comments engender a substantial prejudice against the defendant such that it is impossible to say whether a guilty verdict resulted from those comments. *Id.* Prosecutorial misconduct in closing arguments will warrant a reversal and new trial where the improper remarks constitute a material factor in the defendant's conviction. *Wheeler*, 226 Ill. 2d 92 at 123. If the jury could have reached a contrary verdict had the improper remarks not been made or if, on review, it cannot be determined that the prosecutor's improper remarks did not contribute to the defendant's conviction, a new trial should be granted. *Id.* In reviewing a claim of prosecutorial misconduct in closing argument, a court of review will consider the remarks in the

context of the entire closing arguments of both the prosecutor and the defense attorney. *Maldonado*, 402 Ill. App. 3d at 422.

¶ 101 1. No Evidence on Booth's Hands of a Struggle

¶ 102 First, defendant claims that during closing arguments the prosecutor misrepresented Denton's testimony of scientific evidence pertaining to whether defendant and Booth struggled over the gun. Denton's testimony was that he found no evidence of a "close range firing" and the scenario of Booth and defendant struggling over the gun was inconsistent with the evidence he found on Booth's body. Denton also testified that he did not find any evidence on Booth's hands to indicate that Booth had fired the gun, noting that while evidence is not always found on a person's hands when the person has fired a gun, when there was evidence present on the hands it was "pretty clear." In her closing argument, the prosecutor argued that Denton had testified that defendant's claim that Booth pulled the gun out and they struggled over the gun "could not have happened by the science because the science tells us that there was no soot or abrasions or bruising or injury to any of [Booth's] hands." The prosecutor argued that "in all [Dr. Denton's] years" when there is a struggle for the gun, "he told you there will be evidence of soot, abrasions, bruising, something on the hands that struggled." It appears that the prosecutor misstated the evidence because Denton did not testify that if there was a struggle for gun there would be evidence "on the hands that struggled." There was no evidence to support her contention that the lack of evidence on Booth's hands meant that a struggle for the gun definitively "could not have happened." Therefore, the prosecutor's argument was improper.

¶ 103 However, the improper remark did not constitute a material factor in defendant's conviction to warrant a reversal. Denton opined that the defendant's scenario of the gun going off during a struggle was inconsistent with the evidence that showed the shooting did not occur

at close-range. Denton indicated it was possible Booth could have been shot while struggling with someone with their arms up, but no one, other than defendant, had indicated that defendant and Booth had struggled with their arms raised. Thus, the error was not so fundamental or of such a magnitude to affect the fairness of the trial or challenge the integrity of the judicial process under the second prong of plain error. See Ill. S. Ct. R. 615 (eff. Jan. 1, 1967).

¶ 104 2. Jasmine's Burks's Demonstration of Defendant Shooting Booth

¶ 105 Defendant complains that the prosecutor "recounted a demonstration that never happened" when the prosecutor indicated "as I recall and I stood here and I said to Jasmine show me what he did" and Jasmine went like that and pointed right at me (Indicating). Jasmine testified that she saw that defendant had a gun and she saw defendant shoot Booth in the chest. It is possible that Jasmine gestured as she testified, but the record does not indicate Jasmine made a demonstration of the shooting in response to the prosecutor specifically asking her to do so. Rather than asking Jasmine, the prosecutor had specifically asked Tracina to demonstrate how defendant shot Booth and the record showed Tracina indicated how defendant did so. It appears that the prosecutor incorrectly recalled which witness made the demonstration. However, the prosecutor's mistake did not constitute a material factor in defendant's conviction and, therefore, was not so fundamental of an error or an error of such a magnitude that it affected the fairness of the trial or challenged the integrity of the judicial process under the second prong of plain error. See Ill. S. Ct. R. 615 (eff. Jan. 1, 1967).

¶ 106 3. Witnesses Testified Against Defendant "When They're his Friends"

¶ 107 Defendant contends the prosecutor improperly bolstered the credibility of the State's witnesses by misstating facts not in evidence, namely that Latisha, Tracina, and Angela were defendant's friends. In context, the prosecutor made the comments in rebuttal closing argument

in response to the argument of defendant's attorney that the State's witnesses were "not believable." In her rebuttal argument, the prosecutor argued:

> "The witnesses in this case were not necessarily happy and looking forward to appearing, a lot of dynamics in that different people are friends with different people. And one of the things when I look at the case and decide who to believe and not believe, I think, well, why would the 30 something ladies, Latisha, Miss Jones, Angela Warfield, why would they, when they're [defendant's] friends, come into court and testify?"

¶ 108 Tracina had testified that she was friends with both Booth and defendant. Latisha testified that she had known defendant for 10 or 15 years and, thus, arguably it could have been inferred that they were friends. Angela testified that she knew defendant, but not personally, and testified that she had never met Booth before the evening of the party. The State concedes that the prosecutor stating that Angela was defendant's "friend" was an "overstatement" in light of her testimony that she did not personally know defendant. However, Britiss had testified that the older adults were having a party at her uncle Shondre's house starting in the afternoon of May 23, 2014, and that Britiss and her 22-year-old sisters were having a somewhat overlapping party with their friends that evening at her uncle's home, and she was not friends with her uncle's 30-something friends. Shondre and defendant were close friends. It would have been reasonable to infer from the evidence that the "30 something ladies" were at the party as part of defendant's circle of friends. Nonetheless, any overstatement on the part of the prosecutor did not constitute a material factor in defendant's conviction and, thus, was not so fundamental or of such a magnitude to affect the fairness of the trial or challenge the integrity of the judicial process to warrant a review under the second prong of plain error.

¶ 109 4. Misrepresentation of Facts that Deflated Defendant's Credibility

¶ 110 Defendant argues that the prosecutor misrepresented facts during closing arguments to deflate his credibility. First, defendant takes issue with the prosecutor's arguments that defendant burned his clothes in the street and asked aloud, "Naked? Well, that's what he wants you folks to believe." Defendant had testified that he set his clothes on fire on the street, although not in the middle of the street, and did so wearing boxer shorts. Defendant, upon further questioning, indicated that he was also wearing basketball shorts. The prosecutor's argument that defendant testified that he was "naked" when putting his clothes down the sewer was an improper exaggeration of defendant's testimony. However, the improper remark did not constitute a material factor in defendant's conviction to warrant a reversal and, thus, was not so fundamental or of such a magnitude to affect the fairness of the trial or challenge the integrity of the judicial process under the second prong of a plain error review. See Ill. S. Ct. R. 615 (eff. Jan. 1, 1967).

¶ 111 Next, defendant takes issue with the prosecutor's argument that defendant could not remember "where he got his little razor." However, defendant had testified that his brother brought him clippers before he turned himself into police. In context, the prosecutor was arguing that, in reference to defendant's theory of self-defense as justification for the murder, the jurors had a duty to judge the credibility of the witnesses and, in doing so, the jurors needed to look at defendant's behavior after the shooting. The prosecutor argued that defendant's behavior of running away after the murder was not that of a remorseful man. The prosecutor argued that defendant had to justify the shooting and explain "all these other things" but his story was "just simply not credible" and his story got "bigger and bigger." The prosecutor argued that defendant made incredible claims of shaving his dreadlocks off in the street, burning his clothes in the

street, kicking his burnt clothes down a sewer, not remembering on which street he threw the clothes down the sewer, not remembering where the abandoned house was located that he lived in for two days after the murder, and not remembering where he got his "little razor." The prosecutor argued that defendant's acts were those of a guilty person. While the prosecutor erred in arguing that defendant did not remember where he obtained the razor, the improper remark did not constitute a material factor in defendant's conviction and, thus, was not so fundamental or of such a magnitude to affect the fairness of the trial or challenge the integrity of the judicial process under the second prong of plain error. See Ill. S. Ct. R. 615 (eff. Jan. 1, 1967).

¶ 112 Additionally, defendant takes issue with the prosecutor arguing that "when defendant is confronted with the facts, he changes his story," noting that defendant had told police that Booth went to the green house across the street and circled the house for the police officer, but "when he testified, he said, I didn't say that until then we played the video." On cross-examination, the prosecutor had asked defendant if he was claiming that Booth walked across the street and went into a green house. Defendant responded, "I don't know which house he went to [across the street]." The prosecutor asked defendant if he told police that Booth went into a green house, and defendant responded, "I think it was green." Upon further questioning, defendant acknowledged that he had, in fact, described the house as being green to police and had circled the house on a document. When the prosecutor actually showed defendant the document (exhibit 29) and asked defendant if he had circled the house on that document for police officers, defendant responded, "No. I didn't circle that document. I don't know what, where that document came from." The prosecutor played a video containing the portion of the police video in which defendant circled the green house, and a police detective testified that defendant identified and circled the green house on exhibit 29. Therefore, in testifying, defendant initially

had denied knowing which house Booth went to and subsequently indicated he thought the house was green after he had been asked if he had described it to police as green. He then denied circling the house on exhibit 29. Any error by the prosecutor in suggesting defendant had denied telling police the house was green did not constitute a material factor in defendant's conviction and, thus, was not so fundamental or of such a magnitude to affect the fairness of the trial or challenge the integrity of the judicial process under the second prong of a plain error review. See Ill. S. Ct. R. 615 (eff. Jan. 1, 1967).

¶ 113 5. Misrepresentation of Facts Regarding the Credibility of Defense Witnesses

¶ 114 Defendant argues that prosecution misrepresented facts to deflate the credibility of his defense witnesses, Breanna and Lakisha. During closing arguments, the prosecutor argued that when Breanna was asked on cross-examination who had also been outside during the shooting, Breanna indicated there were two other people whom she did not know. The prosecutor argued that Breanna left out her sister, Lakisha, and wondered aloud to the jury, "Where was Kisha?" However, on direct examination, Breanna had testified that she was outside with her sister and a couple of other people, who she did not know. Breanna was never specifically asked on cross-examination by the prosecutor who was outside during the shooting. Rather, Breanna was asked on cross-examination where Jasmine and Britiss were during the shooting, to which Breanna responded that she did not recall.

¶ 115 Similarly, the prosecutor argued that when Lakisha was asked on cross-examination who was outside during the shooting, Lakisha had indicated that Booth, defendant, and a guy in the corner were outside. The prosecutor argued to the jury that Lakisha "left off Breanna" and the other people that the evidence had showed were outside at the time of the shooting—Jasmine, Britiss, Andrew, and Tracina. However, on direct examination, Lakisha had testified that she

went outside with her sister and on cross-examination, the prosecutor never asked Lakisha who was outside at the time of the shooting. Rather, on cross-examination, Lakisha was asked by the prosecutor what Britiss was doing at that time, to which Lakisha responded, "I didn't see her," and Lakisha was asked what Andrew was doing, to which she responded, "I didn't see him either. I don't know who that is."

¶ 116 When testifying, Lakisha and Breanna did not indicate that anyone, other than themselves, Booth, defendant, and one or two unidentified other people, were outside at the time of the shooting. Witnesses indicated other people would have been outside at the time of the shooting. Specifically, Britiss had testified that she had just returned from a walk with Andrew and two females were outside arguing at that time. Latisha testified that there were two females outside with Booth, Apreley Randle and Tequila Davis, at the time of the shooting and Apreley had immediately administering CPR to Booth after he was shot. Jasmine testified that when she was coming back out of the house from grabbing a cigarette inside, "a bunch of people" were surrounding defendant and Booth.

¶ 117 In context, the prosecutor's argument that Breanna and Latisha left each other out when describing who was outside was made as part of her argument that the three defense witnesses—defendant, Lakisha, and Breanna—could not get their testimony "straight." She argued that they did not know which house Booth went to in order to get the gun or in which hand Booth was carrying the gun, whereas the State's witnesses were consistent in their testimony that defendant got a gun from Lakisha, who had produced the gun from the Crown Royal bag. The prosecutor then erroneously argued that Lakisha and Breanna did not testify to seeing each other outside when asked by the prosecutor. The prosecutor argued that Lakisha and Breanna were unable to describe who was outside at the time of the shooting because they were not outside at that time.

Neither Lakisha nor Breanna testified to seeing Andrew outside, Britiss walk past them, two females arguing (i.e., Apreley and Tequila), Jasmine walking past them into the house or coming back out of the house, or seeing Tracina and Shondre on the porch at the time of the shooting. They also did not generally describe that a bunch of people were surrounding Booth and defendant. Witnesses also testified that Lakisha and Breanna were inside at the time of the shooting. Thus, the evidence supported the prosecutor's argument that Lakisha and Breanna were unable to indicate who was outside at the time of the shooting because neither of them were outside at the time of the shooting. Any error the prosecutor made by incorrectly indicating that Lakisha and Breanna failed to testify that the other was outside when specifically asked by the prosecutor was not so fundamental or of such a magnitude to affect the fairness of the trial or challenge the integrity of the judicial process under the second prong of plain error. See Ill. S. Ct. R. 615 (eff. Jan. 1, 1967).

¶ 118 6. Remaining Alleged Improper Remarks.

¶ 119 We have thoroughly reviewed the remainder of the defendant's claims of improper remarks made by the prosecutor during closing arguments and have determined the remarks were not improper and, even if the remarks were improper, the prosecutor's errors would not constitute a fundamental error under the second prong of a plain error review.

¶ 120 B. Ineffective Assistance of Counsel

¶ 121 Defendant also argues that he was deprived of the effective assistance of counsel because his trial counsel failed to challenge the prosecutor's improper inferences, misstated facts, and misrepresentations of law. To prove ineffective assistance of counsel, a defendant must prove that: (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness; and (2) the deficient performance prejudiced defendant in that but for counsel's

deficient performance, there is a reasonable probability that the result of the proceeding would have been different. See *Strickland v. Washington*, 466 U.S. 668, 694 (1984). As discussed above, most of the prosecutor's remarks complained of by defendant were not improper. Additionally, we cannot say that defense counsel's failure to object to those remarks by the prosecutor that were improper so prejudiced defendant that the outcome of the case would have been different if counsel had objected to those comments. Therefore, defendant was not deprived of the effective assistance of counsel.

¶ 122 II. Trial Court's Failure to Appoint New Counsel

¶ 123 On appeal, defendant contends the trial court erred in finding that there was no need to appoint new counsel to represent him on his ineffective assistance of counsel claim because his counsel failed to notice certain discrepancies pertaining to the State's cell phone evidence and his attorney's response to the trial court's inquiry of his ineffective assistance of counsel claim regarding the cell phone evidence indicated his counsel's "possible neglect of the case." At trial, defendant testified that the cell phone introduced into evidence as exhibit 22 by the State did not belong to him. Two detectives testified, as rebuttal witnesses, that the phone did, in fact, belong to defendant. In support of its contention that two calls were either made or received from or to a phone number ending in 52, at 3:20 a.m. and 3:25 a.m. on May 24, 2014, the State presented exhibits 23 and 24, which depicted screen shots of the calls. Detective Ray also testified that he examined the phone for additional calls made after 3:20 a.m. and 3:25 a.m. on May 24, 2014, and he did not see indications of other calls. During the trial court's inquiry into defendant's ineffective assistance of counsel claim, defendant argued the cell phone was not his and there had been calls made from the phone two days after he was in police custody, which he claimed could not have been made by him. Defense counsel responded that he had no reason to believe

the prosecutors would risk their law licenses to put a fake cell phone into evidence and he believed that foundation and evidence regarding the cell phone was accurate.

¶ 124 On appeal, defendant claims that the two-day gap from when defendant turned himself in to police on May 26, 2014, and the date on the evidence bag of May 28, 2014, together with the allegation of post-custody calls on the phone, "would have seriously undermined the State's claim that the phone belonged to [him]." Defendant also argues that his counsel's failure to recognize that the screen shots from the phone in the State's exhibits 23 and 24 did not show that calls were made to, or received from, a number ending in 52 is further evidence of his trial counsel's failure to recognize "obvious discrepancies" that seriously undermined the State's claim the cell phone belonged to defendant. Defendant contends that his counsel's response upon inquiry from the trial court that counsel believed that foundation and evidence regarding the cell phone was accurate, despite these obvious discrepancies, "strongly suggested possible neglect" of his case by counsel and, thus, the trial court should have appointed new counsel to investigate the claims. We disagree.

¶ 125 When a defendant raises a claim of ineffective assistance of counsel, the trial court is not required to automatically appoint new counsel. *People v. Ayres*, 2017 IL 120071, ¶ 11. Rather, the trial court must conduct an adequate inquiry into the underlying factual basis, if any, of the *pro se* posttrial ineffective assistance of counsel claim during a *Krankel* hearing, which is a common law procedure that evolved from our Supreme Court's decision in *Krankel*. *Id.*; *People v. Krankel*, 102 Ill. 2d 181, 189 (1984). A *Krankel* inquiry is a limited inquiry into a defendant's *pro se* allegations of ineffective assistance of counsel. *People v. Nitz*, 143 Ill. 2d 82, 134-35 (1991).

¶ 126 A reviewing court reviews *de novo* the issue of whether a proper *Krankel* hearing to determine if new counsel should be appointed was conducted in the trial court. *People v. Jolly*, 2014 IL 117142, ¶ 28. Where a proper *Krankel* hearing was conducted, a trial court's finding that it was unnecessary to appoint new counsel will not be disturbed on appeal unless it is manifestly erroneous. *People v. Haynes*, 331 Ill. App. 3d 482, 484 (2002). If the trial court determines that the defendant's claims lack merit or pertain to only matters of trial strategy, then the court need not appoint new counsel and may deny the *pro se* motion. *People v. Moore*, 207 Ill. 2d 68, 78 (2003). On the other hand, if the trial court determines defendant's allegations of ineffective assistance of counsel show trial counsel possibly neglected the case, the trial court should appoint new counsel to investigate the claims and to represent defendant on his ineffective assistance of counsel claim. *Id.*

¶ 127 Generally, any permissible kind of impeaching matter may be developed on cross-examination, since a purpose of cross-examination is to test the credibility of the witness. *People v. Collins*, 106 Ill. 2d 237, 269 (1985). However, the cross-examiner may not impeach a witness on a collateral matter with extrinsic evidence. *Id.* A cross-examiner attempting to impeach a witness on a collateral matter must accept the answer given by the witness on cross-examination. *Id.*; *People v. Terrell*, 185 Ill. 2d 467, 508-09 (1998) (extrinsic evidence may be used to impeach a witness only on noncollateral matters). The test for determining if a matter is collateral is whether the matter could be introduced for any purpose other than to contradict, and that determination is left to the sound discretion of the trial court. *Collins*, 106 Ill. 2d at 269-70.

¶ 128 Here, the issues of whether the cell phone in question belonged to defendant and any issues regarding discrepancies pertaining to the cell phone were collateral issues. See *People v. Santos*, 211 Ill. 2d 395, 405 (2004) (a matter is collateral if it is not relevant to a material issue in

the case); Ill. R. Evid. 401 (eff. Jan. 1, 2011) (" 'relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"). The material issues in this case were whether defendant intentionally shot Booth and whether defendant was acting in self-defense if he did so. Because the issues pertaining to the cell phone were collateral matters, impeachment of the detectives' testimony regarding the cell phone with any extrinsic evidence would not have been permitted and defense counsel would have had to accept the answer given by the detectives on cross-examination. See *Collins*, 106 Ill. 2d at 269; *Terrell*, 185 Ill. 2d at 508-09. Counsel could not have been ineffective for failing to elicit additional evidence regarding the alleged cell phone discrepancies because that evidence was irrelevant in that it did not have any tendency to make the existence of any fact that was of consequence to the determination of defendant's guilt more probable or less probable than it would have been without such evidence. See *People v. Harris*, 2013 IL App (1st) 111351, ¶ 73 (counsel cannot be deemed ineffective for failing to present irrelevant evidence). Consequently, the trial court did not err in finding that it was unnecessary to appoint new counsel to represent defendant on his claim of ineffective assistance of counsel.

¶ 129 CONCLUSION

¶ 130 The judgment of the circuit court of Peoria County is affirmed.

¶ 131 Affirmed.

¶ 132 JUSTICE O'BRIEN, dissenting.

¶ 133 Unlike the majority, I think that this case warrants a reversal under the plain error rule, so I would reverse the defendant's conviction and remand for a new trial. The plain error rule is an exception to the forfeiture principle, allowing a reviewing court to exercise discretion and excuse

a defendant's procedural default. *Sebby*, 2017 IL 119445, ¶ 48. The majority concluded that 5 of the approximately 27 errors in the closing arguments alleged by the defendant were clear and obvious errors, but concluded that the evidence of the defendant's guilt was overwhelming and that none of the errors was so serious that it affected the fairness of the defendant's trial.

¶ 134 First, I find that there was not overwhelming evidence of the defendant's guilt. No weapon was ever recovered, the doctor did not rule out a struggle, and most of the witnesses were interested or impeached. Even though there were many more witnesses in this case than in *People v. Naylor*, 229 Ill. 2d 584 (2008), it was still essentially a credibility contest. The problem is that the factual errors in the closing arguments – including the ones found to be errors by the majority opinion - all go to the heart of this credibility contest. "What makes an error prejudicial is the fact that it occurred in a close case where its impact on the result was potentially dispositive." *Sebby*, 2017 IL 119445, ¶ 68.

¶ 135 When there are numerous instances of improper prosecutorial statements, a reviewing court may consider the cumulative impact of the statements, rather than just considering each statement in isolation. *People v. Abadia*, 328 Ill. App. 3d 669, 684 (2001). In this case, the cumulative impact of the misstatement of the doctor's testimony, the implication that the "30 something" ladies were the defendant's friends or had no skin in the game, and misrepresentations of facts to deflate the defendant's credibility and that of his two defense witnesses, along with the numerous other statements that the majority found not to individually constitute error, operated to deprive the defendant of a fair trial. Even if we find that the evidence was not closely balanced, the cumulative effect of the numerous, unchallenged errors in closing argument and rebuttal could have easily been misconstrued as fact by the jury and constituted a material factor in the defendant's conviction, depriving the defendant of a fair and impartial trial.

¶ 136 Also, I would find that defense counsel rendered ineffective assistance by failing to object to the prosecutors' closing arguments. To prevail under the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant claiming ineffective assistance of counsel must demonstrate that his counsel's performance fell below an objective standard of reasonableness and that the performance prejudiced the defense of the case. *Strickland*, 466 U.S. at 687. While it could be considered trial strategy to refrain from objecting during closing arguments, that strategy becomes untenable once the misstatements get into double digits. But for counsel's failure to object, there was a reasonable probability that the result of the proceeding would have been different.