2018 IL App (1st) 143636-U

Nos. 1-14-3636, 1-14-3868, 1-15-1135, consolidated

Order filed on September 28, 2018.

Second Division

IN THE

APPELLATE COURT OF ILLINOIS

FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
	)	Cook County.
Plaintiff-Appellee,	)	
	)	
v.	)	Nos. 12 CR 11846
	)	11 CR 16145
	)	11 CR 16147
	)	
MARCUS WASHINGTON,	)	The Honorable
	)	Stanley J. Sacks,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE LAVIN delivered the judgment of the court.
Justices Pucinski and Hyman concurred in the judgment.

ORDER

¶ 1 *Held*: Defense counsel was not constitutionally ineffective as counsel's decision to join the three charged cases of two armed robberies and felony murder was proper and did not result in any prejudice. The jury instruction as to other-crimes evidence was not improper and counsel was not ineffective in failing to object to the instruction absent any prejudice. The trial court did

not abuse its discretion in denying defendant's request to bar certain grand jury testimony and a portion of defendant's videotaped statement or in permitting several photographs of the hospital-bound victim to be admitted and shown to the jury during deliberations. Defendant failed to establish prosecutorial misconduct during closing arguments. This court affirmed the judgment of the circuit court.

¶ 2 Following a jury trial, defendant Marcus Washington was found guilty of committing felony murder and two armed robberies, then sentenced to life imprisonment. On appeal, he contends his defense counsel was constitutionally ineffective for requesting joinder in a single trial of his armed robbery charges with the felony murder charge. He further contends the jury was improperly instructed as to other crimes' evidence, the trial court improperly admitted evidence of other uncharged offenses and also improperly published photographs of the hospital-bound victim, who later died, to the jury. Last, defendant contends the State committed a number of errors during closing argument. We affirm.

¶ 3 BACKGROUND

¶ 4 Defendant was charged after he and his co-defendant Alexander Vesey allegedly committed a series of armed robberies in detached garages abutting alleyways across Chicago in 2011, using various Enterprise rental cars as getaway vehicles. Specifically, in 11 CR 16145, defendant, along with Vesey, was charged with committing armed robbery with a firearm against the victim Robert Hawkins on August 21, 2011, in Hawkins' alleyway garage. In 11 CR 16147, defendant, along with Vesey, was charged with committing armed robbery with a firearm against the victim Farhan Hasan on August 31, 2011, in Hasan's alleyway garage. In addition, on August 24, 2011, during an attempted armed robbery of the victim Luis Herrera, who was working as an automechanic in the alley near his garage, Vesey allegedly stomped on Herrera's head, killing him, and then fled in a rental vehicle with defendant. With defendant's confession being the primary evidence of this last crime, in 12 CR 11846, defendant alone was charged with

committing the felony murder (predicated on the attempted armed robbery) of Herrera on August 24. Following the implementation of charges, the cause proceeded to pre-trial proceedings. Early on, defendant's theory of the case was that Vesey had coerced him into committing the various crimes and, specifically, the felony murder.

¶ 5 A. *Pre-trial Proceedings*

¶ 6 Prior to trial, defendant appeared before Judge Nicholas R. Ford on the armed robbery charges. Judge Ford eventually oversaw the jury trials of codefendant Vesey. See *People v. Vesey*, 2018 IL App (1st) 151513-U (an appeal from the armed robbery involving Hawkins in 11 CR 16145); *People v. Vesey*, 2017 IL App (1st) 143629-U (an appeal from the armed robbery involving Hasan in 11 CR 16147) (PLA denied at *People v. Vesey*, 419 Ill. Dec. 654, No. 122677 (Nov. 22, 2017, 2017)). On July 16, 2012, defendant also appeared before Judge Ford in the felony murder case and moved for a substitution of judges. The case was transferred the next day to Judge Stanley J. Sacks, who ultimately oversaw defendant's jury trial on all three charges as explained further below.

¶ 7 With respect to the felony murder charge, on November 13, 2012, before Judge Sacks, the State moved to admit proof of other crimes, including the armed robberies of Hawkins and Hasan, to show intent, identification, and *modus operandi*. The State noted defendant was in the same rental vehicle when he committed the armed robbery against Hasan on August 31, as when the Herrera murder occurred on August 24. The State also noted that defendant committed the Hawkins armed robbery, acting as the gunman, along with his co-defendant just three days before the Herrera murder, and then seven days later he committed the Hasan armed robbery with the same co-defendant, thus militating against his coercion defense and establishing intent to aid Vesey in the Herrera crime. Defense counsel argued vigorously that the offenses were too

dissimilar in terms of time, geography, type of victim, manner of offense, the number of offenders, plus their physical descriptions by the victims. She argued defendant had only been identified in one armed robbery and further that the other-crimes evidence would be unduly prejudicial. After engaging in a volley of back-and-forth arguments with defense counsel, the court granted the State's motion, finding the other crimes evidence admissible to establish defendant's intent and identification, and further finding it was more probative than prejudicial. The court, however, declined to find the crimes demonstrated such similarity as to establish *modus operandi*.

¶ 8 Meanwhile, at that time, defendant's two armed robbery cases remained pending before Judge Ford. On October 11, 2012, before Judge Ford, the State sought to admit other-crimes evidence in the Hasan armed robbery occurring on August 31, 2011. In particular, the State sought to introduce the Hawkins' August 21 armed robbery to show *modus operandi*, intent, and identity. The State noted that Hawkins had identified both defendant and co-defendant Vesey as the offenders, while Hasan had only been able to identify Vesey. The State argued that while defendant claimed he was coerced by Vesey into committing the August 31 Hasan armed robbery, this was dispelled by defendant's involvement with Vesey in the armed robbery against Hawkins a mere 10 days before. Judge Ford ruled that the proof of other crimes evidence was more probative than prejudicial, and he would allow the evidence for all three reasons cited by the State. With respect to *modus operandi*, the court noted that the defendant and his cohort committed the armed robberies against the victims in their garages at gunpoint, then fled through the alleyways. The crimes were geographically close and within a short period of one another.

¶ 9 Based on the other-crimes rulings, on May 2, 2014, and with defendant present, defense counsel made an oral motion to join the cases before Judge Sacks. In accordance with that

request, Judge Sacks explained that the murder and armed robbery cases would all be tried together, and defendant stated he understood and this was his wish, while he also acknowledged that his lawyer had already explained the matter to him. The court then granted the oral motion, which was later supplemented with a written motion. Defendant subsequently asserted alibi, misidentification, and reasonable doubt defenses to the armed robberies and, as stated above, a compulsion defense to the felony murder of Herrera.

¶ 10 B. *Jury Trial, State's Case*

¶ 11 As stated, trial evidence showed defendant and Vesey committed the armed robberies using various Enterprise rental cars as getaway vehicles. In particular, the State presented evidence showing that around August and September of 2011, when the crimes at issue occurred, Washington was listed on a series of Enterprise rental cars in Oak Park as an authorized user by his wife, Suzette Washington, who identified her home address as 5334 West Van Buren Street, Chicago. Suzette rented a 2010 silver Chevy "HHR" (SUV) vehicle on August 24. The next day, she or defendant traded it in for a 2010 Pontiac G6, which had no documented mechanical problems. At 6 p.m. that night, on August 25, they traded the Pontiac for a 2011 silver Nissan Altima. The rental of the silver Altima occurred just days before the armed robbery of Hasan, during which he witnessed the robbers driving away in a silver Altima with a similar, albeit different, license plate number. Hasan reported the license plate number as N280083[1] when it was actually N280030. The car rentals were likewise consistent with a neighbor's report of seeing a silver car around the scene of the Herrera murder on August 24.

¶ 12 Suzette or defendant returned the Altima on September 6, having incurred 151 miles, only to then replace it with a 2011 green Kia Sorrento, bearing number of N240644. It was this

[1]Enterprise records showed the company owned a 2011 gray Chevy Impala with the license plate number N280083, but testimony established that the Chevy Impala and the Nissan Altima did not look alike.

Kia Sorrento that Sergeant Dominic Ciccola, a detective on the FBI's violent crimes task force, sought out on September 8, 2011. After running the license plate number, he learned the vehicle was leased from Enterprise, and eventually located the vehicle at 5334 West Van Buren Street in Chicago, Suzette's reported address. While following it, he saw defendant enter the Kia, speeding off. Police then apprehended defendant a short distance away. Sergeant Ciccola also identified the Kia SUV from the State's exhibits 36 and 37 and made an in-court identification of defendant. Once in custody that same day, and following *Miranda* warnings, defendant provided police with the name of "Tiny," or his co-defendant, Vesey, who is ironically 6'3, as the police were also looking for him. Vesey was eventually placed in custody. Defendant then made a series of incriminating statements to investigators.

¶ 13 The following discussion will elucidate the evidence at defendant's jury trial, including testimony by the crime victims and their relatives/friends describing the crimes that defendant committed along with Vesey, followed by evidence of defendant's incriminating statements to police and the State's Attorney.

¶ 14 1. *The Armed Robbery of Hawkins on August 21, 2011*

¶ 15 Robert Hawkins testified that the around 9:30 a.m. on August 21, 2011, he and his brother-in-law, Travis Miller, were in the kitchen of his home, 2215 West Polk Street in Chicago, waiting to go on a motorcycle ride. Hawkins looked out his kitchen window overlooking the alley and noticed a man there surveying backyards. Hawkins and Miller then proceeded to Hawkins' detached garage abutting the alley. Hawkins opened the garage door, took out the garbage, and then noticed the same man walking towards him. Hawkins asked if he needed anything and the man (later identified as defendant) immediately produced a gun and pointed it directly at Hawkins' torso from two to three feet away. Defendant ordered Hawkins

into the garage, and upon noticing Miller, defendant also motioned towards the alley and waved two other men inside, one later identified as Vesey. Defendant demanded Hawkins' cash, and the offenders proceeded to take Hawkins and Miller's wallet, keys, and cell phones. The offenders then fled in a silver car. Hawkins subsequently had his neighbor call the police, and Hawkins related his observation of defendant's neck tattoo during the armed robbery.

¶ 16 Hawkins identified both defendant and Vesey in the physical lineup and also identified defendant in court. In the lineup, Hawkins specifically noted that defendant was the gunman and Vesey was the man who took his property while defendant pointed the gun at Hawkins.

¶ 17 Chicago Police Detective Andy Li testified that he provided defendant with *Miranda* warnings, after which defendant admitted that on the morning of August 21, 2011, along with Alexander Vesey (known as "Tiny"), he was driving a rented silver Nissan Altima along with another black male. Defendant stopped the vehicle to urinate at which time he saw two white males in a garage. He reported this to Vesey, who ordered the offenders to exit the vehicle, and they proceeded to the garage. According to defendant, Vesey gave him a wrench and told him to "act like it was a gun." Defendant admitted entering the garage, pretending he had a gun, and pointing it at the victim. Defendant said Vesey was actually armed and pointed his gun at defendant, thus forcing him to commit the crime. Vesey and the other offender then took the victims' property, returned to the car, and drove away.

¶ 18 2. *The Attempted Armed Robbery and Murder of Herrera on August 24, 2011*

¶ 19 On August 24, 2011, the 49-year-old, Spanish-speaking victim Herrera and his wife Carmen Herrera ("Carmen") lived at 5142 West Bloomingdale in Chicago. Herrera was working as an auto mechanic on a vehicle in the alley behind his garage. Carmen went to work after speaking with Herrera around 4 p.m. A half hour later, Louis Rojas, Herrera's neighbor and

friend, was driving home to 5162 West Bloomingdale when he saw Herrera working on a vehicle. Rojas parked and went inside the garage, where he spoke briefly with Herrera, and then went home. Around 7:15 p.m., Rojas was on his back porch overlooking the alley when he noticed a silver vehicle by the vacant house next door at 5160 West Bloomingdale, and shortly thereafter learned something had happened in the alley. Rojas proceeded to Herrera's garage, where he saw the fire department and paramedics with Herrera on the ground, although he didn't recognize him for several seconds because Herrrera had been so badly beaten. Herrera was "screaming like a kid, like a child," but unable to talk, with a sliced forehead, scalp, and sliced ear. Rojas observed blood on the van outside the garage, near the van, and on the garage floor. His cell phone and wallet were subsequently found in his home. Herrera was taken by ambulance to the hospital, where he died about a month later after having undergone brain surgery. Carmen testified that her husband was unrecognizable there and the parties stipulated that Carmen would identify two photographs of Herrera as he appeared in the hospital and a photograph of him taken after his death.

¶ 20 The medical examiner testified that Herrera's skull fractures were consistent with having been kicked or stomped upon repeatedly and being beaten with a blunt object like a gun or pistol whipped. He opined that Herrera's death was due to blunt trauma to the head from an assault and the manner of death was homicide. The medical examiner likewise identified autopsy photographs, including the State's exhibit 4 as a photograph of Herrera's face and part of his craniotomy, exhibit 21 as a profile photo of the uninjured side of Herrera's face and head, and exhibit 22, showing the injured side of Herrera's head and the results of his surgery, including suture lines and with dark red discoloration or bleeding associated with it, as well as a black eye. Those three photos were admitted to the jury during deliberations.

¶ 21 Detective Rolando Rodriguez spoke with defendant on September 9, 2011, and following *Miranda* warnings, defendant made his first statement, initially denying any involvement in the Herrera murder. Defendant relayed that Vesey had told him he had hurt a "little Mexican" because the little Mexican didn't want to give up his money. The "little Mexican" was fixing a vehicle in the alley by a garage when Vesey had approached him from behind, struck him over the head with a gun, and then stomped on his head with his feet. The incident occurred about two weeks prior to defendant's arrest. Defendant had loaned Vesey the silver Nissan Altima the morning of the incident. Vesey later told defendant and a man named "Breed," a male black with braids, the story as they were standing at Warren and Kedzie. Defendant did not know Breed's real name, but stated he had recently been arrested for a narcotics offense. A computer search in the Chicago police database revealed Breed to be Maurice Funches, a fact verified by defendant. Detective Rodriguez then interviewed Funches, and returned to defendant, at which point defendant cried while admitting that he was a witness to the beating of the little Mexican but was scared of Vesey's family, so he didn't want to tell anyone. Defendant then relayed to Detective Rodriguez what occurred the day of the beating, conveying substantially the same as his videotaped statement which is set forth below. Defendant later directed police to the location of where the murder occurred and related the events as they occurred at the scene.

¶ 22 In defendant's videotaped confession to the Herrera felony murder, which he made to several detectives and which was published to the jury, defendant stated that on August 24, 2011, he and Suzette rented an "HHR" vehicle from the Enterprise at Chicago Ave and Austin. The brakes were defective, so he exchanged it for a 2011 silver Altima. Defendant eventually ran into "Tiny," whom he'd known for several months. Tiny had "stuck a gun" to him the night before because defendant owed him money, so the two took defendant's car to "do a run," with

defendant driving and Tiny aiming do a "lick," *i.e.* rob someone. After Tiny entered the car, defendant became "scared for [his] life," knowing that Tiny was a "bad guy" who had just returned from the penitentiary after 15 years, having committed numerous violent crimes. The two picked up Tiny's unidentified friend and at Tiny's direction drove to Leavitt and Lake Street, where having spotted a potential robbery victim, Tiny exited the car and approached the startled victim while his friend stood watch so defendant did not drive away. Tiny directed the victim into a dark area of the street. On returning to the car, Tiny had a bag plus a burgundy and chrome 25 automatic gun and told his friend, "we did good." At Tiny's direction, defendant dropped off the friend who then took the bag to a liquor store while Tiny stated that he wasn't "finished yet, I got one more in." Tiny directed defendant to drive to the north side, so defendant drove north on Central to Niles while Tiny looked for victims in the alley and outside walking but didn't find any.

¶ 23 Defendant eventually manufactured a story that his wife had to work, so he began driving back home. Around 4:30 p.m. or 5 p.m., after passing Grand Avenue and Laramie, the two drove by a vacant lot just north of Bloomingdale. As they approached the two alleys, Tiny asked defendant to pull over. There, defendant saw a "little Mexican guy" working on a car about midway down the alley. When Tiny saw the man, "that was his lick right there." Tiny exited the vehicle, then ran towards the man, while at Tiny's direction, defendant drove through the alley and around the block, ending behind Bloomingdale. Defendant drove west towards Laramie. As he approached a car, he saw Tiny kicking the man five times hard, "putting his feet down on the man," and the man was balled up on the ground, covering himself. Defendant was nervous and scared, so he quickly drove away. Tiny chased defendant and ran around the front of the car, waving his gun at defendant and hollering for him to stop. Defendant did so and Tiny entered the

vehicle, stating "I almost broke my knuckle on that little motherfucker." Defendant asked Tiny why he did that to the man, and Tiny, with his gun resting on his lap, responded, that the "little Mexican motherfucker" was strong. Defendant told him he didn't have to do that, but Tiny "freaked out" and shoved the gun in defendant's side, and defendant assured him "you ain't gotta do that. I'm gonna get you away." Tiny never showed defendant if he took anything from the man, but defendant knew he did because Tiny "was so frantic after he did it" and "that was his whole point." Defendant drove to the projects, where he let Tiny out. Defendant heard Tiny explain to one of his friends with cornrows that "he had to get down on, on the Mexican dude." Defendant knew Tiny was going to do robberies but not that he was going to beat the man. Defendant stated "I don't want to go down for no stuff *** like this that I ain't do."

¶ 24 Following defendant's videotaped confession, the State presented the testimony of Maurice Funches, whom defendant had identified as "Breed." Funches, a drug addict with robbery and drug convictions, testified as an adverse witness regarding statements defendant made to him following the Herrera murder. In particular, Funches denied having made earlier statements to detectives that defendant admitted the Herrera crimes, and Funches essentially disavowed his grand jury testimony that defendant had made incriminating statements to him on August 25. He claimed his statements to the grand jury in that regard were either lies or he did not remember making them.

¶ 25 To rebut this adverse testimony, the State called Assistant State's Attorney Krystyn Dilillo, who testified that she presented Funches as a witness before the grand jury on February 1, 2012, regarding defendant's statements made to Funches on August 25, 2011. Over defendant's objection, ASA Dilillo read Funches' grand jury testimony, so as to publish it before the jury and enter it into evidence. In the grand jury proceedings, Funches testified that on the

evening of August 25, 2011, he was on the corner of Kedzie and Warren when defendant and co-defendant drove up in defendant's rented silver Nissan Altima. After parking, they both approached Funches, and defendant told him about a few robberies they had committed on the north and west sides of Chicago. Defendant stated that he and Vesey had been "hitting licks and taking care of business," which Funches understood to mean robbing people. Funches testified that defendant told him that during one of the robberies up north, defendant and Vesey both walked up to a "Mexican" who refused to give up his money, so "they had ended up whipping him," which Funches understood to mean they beat him. Defendant specifically reported that Tiny asked for the money and Tiny "ended up hitting" the victim after which "he went into his pockets and got the money." While defendant relayed the story, Vesey was "just kind of smirking." Funches acknowledged speaking with detectives on September 9, 2011, and telling them what he had just reported to the grand jury.

¶ 26 3. *The Armed Robbery of Hasan on August 31, 2011*

¶ 27 Hasan testified that on August 31, 2011, around 2:30 p.m., he had just dropped off his wife and two children at their house, 7311 West Montrose in Norridge, and proceeded through the alley to his detached garage when he noticed a silver gray Nissan Altima in his rearview mirror. After parking in his garage, Hasan stepped into the alley, then saw two African American men running towards him, coming from that same Altima parked about three or four houses away. One man, later identified as Vesey, was taller and thinner with a goatee-like stubble, short dread locks, dirty teeth and bloodshot eyes. Hasan was better able to observe Vesey's face during the encounter. The other man, whom authorities later pegged as defendant, was shorter and stockier and wore a white t-shirt with blue jean shorts. With Vesey about one to two feet away and defendant not far behind, Hasan offered to help the men, believing they might need

directions. Vesey then ordered Hasan to "get the fuck" in the garage as he brandished a champagne-gold colored gun. Vesey ordered Hasan into the garage corner facing the wall. The two offenders took Hasan's wallet, keys, GPS, DVD player, Movado wristwatch, and two laptops. Hasan believed Vesey had the gun in his hand the entire time. They then fled in the silver Nissan Altima. Hasan called the police and provided what he believed was the license plate number, N280083.

¶ 28 Hasan identified Vesey in a lineup as the gunman, although he was unable to identify defendant. Inside the Kia that defendant was driving just prior to police apprehending him, police discovered Hasan's Movado[2] watch. At trial, Hasan identified his Movado watch that was taken during the armed robbery.

¶ 29 Norridge police detective Charles Tortorello testified that the Chicago police department notified him after taking defendant into custody, and Detective Tortorello and his partner proceeded to the Chicago station, where they interviewed defendant. Following *Miranda* warnings, defendant made a statement with respect to the August 31 armed robbery of Hasan. Defendant stated that the day before, he lost about $600 in a dice game, and thereafter Vesey pointed a gun at him, stating defendant owed him. When defendant responded that he didn't have the money, Vesey asked him if he was still driving the rental car. The next day, the two were driving around in the Belmont Central neighborhood of Chicago when Vesey took out his gun after spotting a possible robbery victim. When "they missed their chance to get their lick," or intended robbery victim, Vesey pointed the gun at defendant's head, the two then drove through and alley, at which point they saw a man entering his garage with his vehicle. The two drove around, returned in front of the garage, and Vesey pointed his gun again at defendant, stating, "get your ass out of the car." They then exited, walked into the garage, and Vesey pulled a gun

[2]The transcript incorrectly refers to the watch as a "Novato" wristwatch.

on the victim while defendant ordered him into the corner. Vesey took his keys, GPS, wallet, and cash. Vesey removed a small television from the back of the vehicle and ordered the man to hand over his wristwatch. Police showed defendant a photo of Hasan's garage, and defendant identified it as the garage they were in on August 31, also initialing the photo. Detective Tortorello identified that same photo in court as the one defendant had initialed.

¶ 30 C. *Jury Trial, Defense Case*

¶ 31 As stated, defendant's theory of the case was compulsion as to the August 24 felony murder, an alibi/misidentification as to the August 21 Hawkins armed robbery, and reasonable doubt as to the August 31 Hasan armed robbery. In terms of an alibi, defendant presented the testimony of his relative[3] Tomika Brown. She first met defendant on August 21, 2011, while he was at her house at 719 North Waller Avenue. Defendant and his cousin intended to install her cable that day. Defendant arrived around 8:30 a.m., remaining a couple hours and leaving a little after noon. Defendant was there the entire time working on the cable, and she observed that defendant's arms were covered in visible tattoos. She recalled that specific day because the day before, her family had attended a school rally. On cross examination, Brown said defendant was outside in the backyard the entire time, and she did not know what he was doing, while on redirect she stated defendant came in and out of the house while working.

¶ 32 Several months later, Brown received a letter from defendant, and she visited him in prison several times. She visited because he was being accused of something on August 21, and she felt remorseful. She also visited him in the county jail after receiving another letter from him. Brown denied being in a relationship with defendant or speaking with him about what occurred on August 21 during their jail/prison visits. Brown knew from defendant's letter that he was being accused of an incident that occurred while he was at her house on August 21, but he did

[3]Her child's father is defendant's cousin.

not ask her to testify on his behalf, and he never told her what to say should she testify in his case. Rather, on cross-examination, Brown stated defendant's attorney wanted her to write an affidavit on his behalf.

¶ 33 D. *Sentencing*

¶ 34 At sentencing, the State presented seven certified copies of conviction and requested that defendant be sentenced to life in prison as a habitual offender. Defendant was sentenced to three concurrent terms of life imprisonment. This appeal followed.

¶ 35 ANALYSIS

¶ 36 *Ineffective Assistance for Joinder of Charges*

¶ 37 Defendant first contends that his defense counsel was constitutionally ineffective for requesting joinder of his felony murder charge with the armed robbery charges. He asserts that because of joinder, the jury heard improper other-crimes evidence in both of the armed robbery cases, and he was denied a fair trial. He requests that we reverse his armed robbery convictions relating to Hawkins and Hasan and remand the cases for new trials. A claim alleging ineffective assistance of counsel is governed by the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Veach*, 2017 IL 120649, ¶ 29. In order to succeed on such a claim, a defendant must demonstrate that counsel's performance was deficient and that this deficiency prejudiced the defendant. *Id*. ¶ 30. Defendant must specifically show that counsel's performance was objectively unreasonable and there is a reasonable probability (*i.e.* a probability sufficient to undermine confidence in the outcome) that but for the unprofessional errors, the result of the proceeding would have been different. *Id*. Defendant's failure to satisfy one of the prongs of the test precludes a finding of ineffectiveness. *Id*. As such, a court may "dispose of an ineffective assistance of counsel claim by proceeding directly to the prejudice prong without

addressing counsel's performance." *People v. Hale*, 2013 IL 113140, ¶ 17. For the reasons to follow, we conclude defendant cannot succeed in his ineffective assistance of counsel claim primarily because he cannot establish prejudice, although we briefly address strategy as well.

¶ 38 Here, it's noteworthy that the State succeeded in petitioning the court to introduce the two armed robbery cases to serve as other-crimes evidence in support of the felony murder charge. Likewise, the State successfully petitioned to introduce the August 21 Hawkins armed robbery to serve as other-crimes evidence in support of proving the August 31 Hasan armed robbery charge. It was after these other-crimes motions were filed that defense counsel sought to join all three cases together. Defendant, however, now argues there was no valid strategic reason for defense counsel to do so. Defendant asserts he could have been tried in each armed robbery case without the respective juries knowing he had been charged with felony murder predicated on attempted armed robbery or that he had committed all of the charged crimes with his co-defendant, Vesey. He also notes that the Hawkins jury would not have been informed of the Hasan armed robbery (presumably because the State never sought to introduce other-crimes evidence to support the Hawkins charge). Defendant contends that because of the improper other-crimes evidence, there was a "substantial risk" or "reasonable probability" that the jury convicted him based on his propensity to commit crime, or believing that he was a "bad person deserving of punishment," thus causing him prejudice. He adds that with joinder, it was inevitable the jury would reject his varying defenses of misidentification and reasonable doubt to the armed robberies.

¶ 39 A court may order two or more charges to be tried together if the offenses could have been joined in a single charge, unless joinder would prejudice the defendant or the State. 725 ILCS 5/114-7, 114-8 (West 2010). Offenses may be joined in a single charge (with separate

counts) if the offenses are based on two or more acts which are part of the same comprehensive transaction. 725 ILCS 5/111-4(a); *People v. Fleming*, 2014 IL App (1st) 113004, ¶ 38. Whether a defendant's acts were part of "the same comprehensive transaction" is not determined by precise factors, but rather by the facts presented in each case. *People v. Jackson*, 233 Ill. App. 3d 1089, 1098 (1992). The most important factors in deciding whether offenses are part of a comprehensive transaction is whether they are proximate in time and location and whether there is an identity of evidence between the offenses, *i.e.* whether the court can *identify* evidence linking the crimes. *Fleming*, 2014 IL App (1st) 113004, ¶ 42; *People v. Quiroz*, 257 Ill. App. 3d 576, 586 (1993). Other factors include whether there was a common method in the offenses, so that each of the offenses supplies a piece of a larger criminal endeavor of which the crime charged is only a portion, and whether the same or similar evidence would establish the elements of the offense. *People v. Anderson*, 2013 IL (2d) 111183, ¶ 69; *Jackson*, 233 Ill. App. 3d at 1098.

¶ 40 In this case, the evidence showed that defendant and Vesey[4] trolled Chicago alleyways on the north and west sides of Chicago randomly identifying "licks" or armed robbery victims within a 10-day period between August 21 and August 31, and while using Enterprise rental vehicles to escape. Defendant and Vesey first cased the three victims' homes from the back alleyway. Once Hasan and Hawkins, for example, were seen exiting their garages, defendant and Vesey approached them on foot from the alley, brandished a weapon, and cornered the victims in their garages while forcibly taking their belongings. As to Herrera, who was working in the alley just outside his garage, Vesey approached him on foot, struck him over the head with a gun, at least attempted to forcibly take his belongings, and when he resisted, ultimately beat Herrera to death by stomping on his head. Funches' grand jury testimony corroborated defendant's videotaped confession as to the felony murder. Defendant also brought police to the scene of the

[4]The evidence also showed another possible offender joined in the Hawkins armed robbery.

beating, essentially reenacting the crime. Just prior to the murder, Herrrera's neighbor and friend observed a silver vehicle in the alleyway, which was consistent with both the Enterprise rental records and defendant's own description of his rental vehicle in which he and Vesey fled following the crime. Hasan and Hawkins also described the vehicles consistent with either the rental records or defendant's confessions, and defendant identified in a photograph Hasan's garage as the place of the August 31 armed robbery.[5] Hasan identified the license plate of the rented Nissan Altima with near accuracy. Likewise, defendant was found driving yet another of the rental vehicles, the Kia, several days after the armed robbery of Hasan at the address listed by his wife Suzette at Enterprise. Inside the Kia, authorities discovered Hasan's Movado wristwatch. Moreover, in a line-up, Hawkins identified both defendant and Vesey as the offenders, while Hasan identified Vesey.

¶ 41 This evidence surely satisfies the requirements for joinder. First, there is plenty of evidence linking these crimes, including the manner in which they were committed against the victims (with a firearm in garage alleyways using rental vehicles), the motive, and the criminal offenders involved (defendant and Vesey). See *People v. Reynolds*, 116 Ill. App. 3d 328, 335 (1983) (the second offense provided evidence linking the defendant with the first offenses).

[5]The rental records submitted into evidence show defendant, via his wife, rented the silver Nissan Altima on the evening of August 25. Defendant argues this is inconsistent with Hawkins' description of the getaway car on August 21 as a silver Nissan Altima. The evidence, however, does not preclude the possibility that defendant rented that same car from a different location. Regardless, defendant's confession, in which he describes driving a silver Nissan Altima that he *had rented* for the August 21 armed robbery of Hawkins, provides sufficient corroboration of Hawkins' testimony.

Defendant also confessed to trading in the silver HHR vehicle on August 24 for a silver Nissan Altima, before committing the Herrera felony murder. He now argues this is inconsistent with the rental records, showing he traded the cars a day later on August 25. However, the fact that both cars were silver supports Rojas's (the neighbor/friend) description of the vehicle he saw in the alley around the time of the murder. Moreover, any number of reasons could have accounted for this discrepancy. Defendant, for example, could have misremembered the dates of the exchange. Either way, the evidence linking the rental vehicles to the crimes and defendant's confessions remains largely consistent. Minor discrepancies in testimony affect only its weight and will not render it unworthy of belief. *People v. Gray*, 2017 IL 120958, ¶ 47. In addition, where inconsistencies in testimony relate to collateral matters, they need not render the testimony of the witness as to material questions incredible or improbable. *Id.*

Next, there was a common method of operation[6] or design in that each of the offenses formed a piece of the larger criminal endeavor of "hitting licks and taking care of business" or a motive to rob a number of people on the north and west sides of Chicago[7] while evading detection through the use of rental vehicles. See *People v. Harris*, 147 Ill. App. 3d 891, 895 (1986) (the defendant's attacks against elderly women within 31 hours had a common method of operation, in addition to other factors, supporting joinder); *People v. White*, 129 Ill. App. 3d 308, 315-18 (1984) (joinder appropriate where the offenses constituted a concerted, systematic theft from a muffler shop over a period of time); *People v. Mikel*, 73 Ill. App. 3d 21, 27 (1979) (joinder appropriate where evidence showed the murder and aggravated assaults against three different victims were "part of a shooting spree engaged" in by the defendant and his co-defendant, thus revealing a common motive, design and method of operation). Additionally, for the same reasons that we have found there was evidence linking the crimes, we find that much of the evidence establishing the elements of the offenses was the same or similar.

¶ 42 As to the location factor, we note again that the offenses were committed in garages and garage-alleyways. Although the distance between the various homes is not part of the record on appeal, this court may take judicial notice of the distances between two locations. *People v. Deleon*, 227 Ill. 2d 322, 326, fn. 1 (2008). Google maps shows that the distance between Hawkins and Herrera's home is about 7 miles; the distance between Herrera and Hasan's home is about 6 miles; and the distance between Hawkins and Hasan's home is about 15 miles. We observe that a number of cases finding in favor of joinder have involved crimes occurring in

[6] Defendant confuses a "common method" in the offenses with *modus operandi*. As set forth in *People v. Walston*, 386 Ill. App. 3d 598, 606 (2008): " 'A common design refers to a larger criminal scheme of which the crime charged is only a portion. *Modus operandi* means, literally, 'method of working,' and refers to a pattern of criminal behavior so distinctive that separate crimes are recognizable as the handiwork of the same wrongdoer,' " quoting *People v. Barbour*, 106 Ill. App. 3d 993, 999-1000 (1982). *Id.*

[7] While Norridge is not in Chicago, it borders the city.

closer time and geographic proximity. See *Quiroz*, 257 Ill. App. 3d at 586 (shootings and armed robbery crimes occurred within an hour and two blocks of one another, supporting joinder); *Reynolds*, 116 Ill. App. 3d at 335 (two separate robbery crimes occurred within minutes and also one and one-half miles of one another, supporting joinder). However, the fact that the offenses did not occur immediately one after the other does not automatically eliminate the several acts from the category of a comprehensive transaction. *White*, 129 Ill. App. 3d at 315-18 (burglary occurring seven and two months from the respective theft offenses was part of same comprehensive transaction for joinder); *but see People v. Walston*, 386 Ill. App. 3d 598, 603 (2008) (noting that, as events become separated by time and distance, the likelihood decreases that they may be considered part of the same comprehensive transaction). As explained above, due to the nature and manner of defendant's crimes, joinder was appropriate.

¶ 43 We also hold that the potential prejudice of a jury deciding three separate charges is greatly diminished where the jury is going to receive evidence about both charges anyway. See *People v. Zirko*, 2012 IL App (1st) 092158, ¶ 60. Defendant argues evidence relating to the felony murder would *not* be admissible in the armed robbery trials. However, as the State points out, subsequent acts or crimes are admissible to show motive, intent, identity, absence of mistake or accident, the existence of a common design or plan, or *modus operandi*. *People v. Banks*, 161 Ill. 2d 119, 137 (1994); *People v. King*, 384 Ill. App. 3d 601, 606 (2008); see also *People v. Wilson*, 214 Ill. 2d 127, 136 (2005) (other-crimes evidence is admissible so long as it bears some threshold similarity to the crime charged). Other-crimes evidence may also be permissibly used to show, by similar acts or incidents, that the act in question was not performed inadvertently, accidentally, involuntarily, or without guilty knowledge. *Wilson*, 214 Ill. 2d at 136. We cannot definitively say that the evidence of Herrera's felony murder or of other armed robberies

committed by defendant and Vesey would not have been admissible in a separate trial for the armed robbery of Hasan or Hawkins, especially to prove intent, identity, or common design or plan, and especially where defendant contested his involvement in the offenses or claimed he was coerced. See *People v. Quintero*, 394 Ill. App. 3d 716, 727 (2009); *People v. Allen*, 335 Ill. App. 3d 773, 780 (2002). It's noteworthy that Judge Ford permitted the State to introduce other-crimes evidence in the Hasan armed robbery to show *modus operandi*, intent, and identity. Defendant does not contest this finding on appeal, nor has defendant offered any valid reason to conclude such evidence would not have been admissible in a separate trial for Hawkins.[8] Judge Ford's finding alone diminishes the likelihood of any claimed prejudice by defendant. As such, any claimed error is harmless. See *Walston*, 386 Ill. App. 3d at 609.

¶ 44 We further note that, as set forth above, the evidence that defendant committed the two armed robberies was substantial given the victims' line-up identifications of defendant and/or Vesey, as well as defendant's incriminating statements/confessions that he forcibly took the victims' belongings on the dates in question while using rental vehicles. Defendant's claim that there was not substantial evidence of the armed robberies or that the evidence of those offenses was closely balanced is simply an offense to common sense. [9] For that reason as well, even if the cases were severed, defendant has failed to show that there is a reasonable probability that but for defense counsel's conduct, the results of the proceeding would have been different.

[8] It is further noteworthy that Vesey also went to trial for the August 31 armed robbery of Hasan. In that jury trial, the State introduced other-crimes evidence of the August 21 armed robbery involving Hawkins and another armed robbery on September 8 involving Renadu Catoc. This court upheld the use of other-crimes evidence to prove identity and *modus operandi*. *People v. Vesey*, 2017 IL App (1st) 143629, ¶¶ 21-26**.** Likewise, in a subsequent jury trial against Vesey for the August 21 armed robbery of Hawkins, the State admitted other-crimes evidence relating to Catoc to prove identity and *modus operandi*. See *People v. Vesey*, 2018 IL App (1st) 151513-U. Vesey, however, did not dispute the other-crimes evidence in that appeal.

[9] Defendant argues the evidence as to the armed robberies was closely balanced in part because his statements to police were not memorialized in writing or recorded and also argues the identifications were questionable. It merits mention that defendant has not challenged the validity of his incriminating statements on appeal, nor has he challenged the line-up evidence or the sufficiency of the evidence.

Therefore, we hold that defense counsel's conduct was not ineffective because defendant cannot establish prejudice.

¶ 45 Given the record before us, we must also presume that counsel's decision to join the charges was a matter of trial strategy. See *Zirko*, 2012 IL App (1st) 092158, ¶ 59; see also *People v. Fuller*, 205 Ill. 2d 308, 331 (2002) (a defendant is entitled to reasonable, not perfect, representation, and mistakes in strategy or in judgment do not, of themselves, render the representation incompetent; counsel's strategic choices are virtually unchallengeable). The record establishes that defense counsel considered the fact that other-crimes evidence would be permitted in the murder trial and Hasan's armed robbery trial before requesting joinder. Given that there was shared evidence among the various offenses, counsel most likely took into consideration judicial efficiency in requesting joinder, a factor to be considered apart from whether the offenses formed the same comprehensive transaction. See *Walston*, 386 Ill. App. 3d at 602. Likewise, we can presume counsel considered the heightened standard of proof, beyond a reasonable doubt, that the State would maintain as to each offense under joinder in a single trial. For example, had the State tried Hasan separately for armed robbery and admitted the Hawkins armed robbery as other-crimes evidence, the beyond-a-reasonable-doubt burden would have applied only to the Hasan armed robbery.

¶ 46 Significantly, counsel discussed the joinder matter with defendant, and on the record, the court directly confirmed with defendant that he agreed to joinder. See *Zirko*, 2012 IL App (1st) 092158, ¶ 59. The record also reflects that, initially, counsel intended to assert a compulsion defense for all three charged crimes. In the joinder motion, defense counsel asserted that the charges could have all been joined in a single charge because they were part of a "common plan orchestrated by a co-defendant, Alexander Vesey." Indeed, there was testimony from police

officers regarding defendant's incriminating statements, including that Vesey pointed a gun at defendant before the two armed robberies and essentially forced defendant to commit the crimes. Although counsel ultimately sought a different strategy, that does not defeat counsel's initial intention when making the oral motion in May.

¶ 47 Moreover, trial counsel's performance must be evaluated on the basis of the entire record. *People v. Stephens*, 2017 IL App (1st) 151631, ¶ 49. Here, defense counsel objected vigorously to other-crimes evidence being introduced, filed motions to suppress statements and quash defendant's arrest and suppress the evidence, filed various motions *in limine*, cross-examined the State's witnesses, presented an alibi witness for one armed robbery, and argued the case before the jury. The fact that another attorney might have pursued a different strategy, or that the strategy chosen by counsel ultimately proved unsuccessful, does not establish a denial of the effective assistance of counsel. See *Fuller*, 205 Ill. 2d at 331.

¶ 48 In reaching this conclusion, we find defendant's reliance on *People v. Johnson*, 2013 IL App (2d) 110535, misplaced. There, the appellate court held defense counsel was ineffective for agreeing to join the charges of domestic battery and unlawful possession of a weapon by a felon, where the jury heard other-crimes evidence relating to various uncharged domestic violence incidents and defendant's prior felony conviction. In *Johnson*, unlike in this case, however, the court concluded that the charges were not part of the same comprehensive transaction, and defense counsel's decision to join the charges related more to convenience than to strategy. Moreover, *Johnson* held the trial court failed to give a limiting instruction on the uncharged domestic battery offenses and failed to instruct the jury it could only consider defendant's status as a felon towards his unlawful possession of a weapon charge, thus creating a reasonable probability that the jury considered improper propensity evidence, which compromised the

fairness of the proceeding. Unlike in this case, in *Johnson* the compounded errors deprived the defendant of a fair trial. For the reasons stated, the present case is distinguishable.

¶ 49 Finally, although defendant has framed the joinder issue as one relating solely to his defense counsel's effectiveness, we note that whether to sever charges, and thus allow for them to be tried separately, is also a matter within the broad discretion of the trial court. *Fleming*, 2014 IL App (1st) 113004, ¶ 38. Here, Judge Sacks carefully oversaw the pre-trial and jury trial proceedings, made reasoned decisions, and permitted the attorneys to present their cases. Rather than permitting a "free-for-all," as defense counsel seemed to orally argue before this court, granting defense counsel's joinder motion reflected a reasoned decision by the trial court to effectively adjudicate separate cases all connected by the same comprehensive transaction. We therefore cannot say the court's decision to permit joinder was arbitrary, fanciful, or unreasonable.

¶ 50 *Trial Court Error and Ineffective Assistance for Improper Jury Instruction*

¶ 51 Defendant next contends that Illinois Pattern Jury Instruction, Criminal No. 3.14 (4th ed. 2000) (hereafter, IPI Criminal 4th No. 3.14) on other-crimes evidence was inaccurate and resulted in an unfair trial of the armed robberies. The instruction stated:

"Evidence has been received that the defendant has been involved in offenses other than that charged in the indictment.

This evidence has been received on the issues of the defendant's identification and intent and may be considered by you only for those limited purposes.

It is for you to determine whether the defendant was involved in those offenses and, if so, what weight should be given to this evidence on the issues of identification and intent."

¶ 52 Defendant now argues the jury improperly heard other-crimes evidence in both Hasan's case and Hawkins' case, contrary to the trial court's earlier rulings in the matter. Regarding Hasan, he argues the other-crimes evidence should have been limited to only the Hawkins armed robbery. Regarding Hawkins, there was no other-crimes evidence. Defendant again asks that we reverse his two armed robbery convictions and remand for a new trial, while he also acknowledged that he failed to properly raise the matter below, thus warranting plain error review.

¶ 53 The State responds that defendant forfeited this issue and even forfeiture aside, there was no error, let alone any plain error. See *People v. Alvidrez*, 2014 IL App (1st) 121740, ¶ 25 (noting, there can be no plain error if there was no error at all). We agree. As the State notes, the other-crimes evidence was only relevant prior to joinder of the three cases under one trial court number and before one jury. See *People v. Pikes*, 2013 IL 115171, ¶ 13 (noting the general rule prohibiting other-crimes evidence for which defendant is not on trial merely to show his propensity commit crimes). Again, we held the three charges were properly joined in a single charge (although under different counts). 725 ILCS 5/114-7, 114-8 (West 2010). They were all part of the same comprehensive transaction. As such, once joined, the three offenses were not *"uncharged" offenses*, as referenced in IPI 3.14, for the jury to consider. Rather, the substantive evidence related to each of the charged offenses, and not another act or crime for which defendant was not on trial. Therefore, there was no need for a limiting instruction. Finally, even assuming any error, the evidence was not closely balanced but rather substantial if not overwhelming that defendant committed the armed robberies, and any claimed error was not so serious as to deny defendant a fair trial. As there was no error, we thus reject defendant's claim that defense counsel was constitutionally ineffective for failing to object to the jury instruction.

¶ 54 *Admission of Statements from Funches and Defendant's Videotaped Confession*

¶ 55 Defendant next contends the trial court erred in admitting certain statements by Funches. Prior to trial, defense counsel filed a motion *in limine* to prohibit the State from referencing Funches' grand jury testimony, relaying defendant's statement that "they've been hitting licks and taking care of business," which Funches understood to mean that defendant and Vesey had been robbing people. Defense counsel argued this constituted testimony about other uncharged crimes that could merely be used to show defendant's propensity to commit crime, which is prohibited. See *Pikes*, 2013 IL 115171, ¶ 13. The trial court ruled the statement actually referred to the charged armed robberies, not other-crimes evidence, and clearly constituted an admission.

¶ 56 Defendant now argues the introduction of those portions of Funches' grand jury testimony referring to prior robberies and the submission of that transcript to the jury denied defendant of a fair trial, and he asks that we reverse his convictions. Defendant renews his argument that there's no basis to conclude that defendant's statement was referencing the charged armed robberies, as opposed to uncharged crimes. As with the admission of evidence, motions *in limine* are directed to the trial court's sound discretion, and a reviewing court will not reverse the trial court absent a showing of an abuse of that discretion, *i.e.* where the trial court's decision is arbitrary, fanciful or unreasonable or where no reasonable person would agree with the position adopted by the trial court. *People v. Becker*, 239 Ill. 2d 215, 234 (2010); *People v. Harvey*, 211 Ill. 2d 368, 392 (2004). Here, we cannot say the trial court's interpretation, that defendant's statements referred to the charged crimes and thus constituted an admission, was unreasonable. See *id*.; see also *People v. Cruz*, 162 Ill. 2d 314, 374-75 (1994) (relevant admissions of a party, such as statements, are admissible when offered by the opponent as an exception to the hearsay rule). According to the grand jury testimony, defendant spoke with

Funches on August 25, one day after defendant and Vesey beat and attempted to rob Herrera, and four days after defendant robbed Hawkins. Defendant told Funches that the robberies were on the north and west sides of the city, consistent with the charged crimes. Defendant in fact discussed specifics with Funches about the attempted armed robbery of Herrera "up north," telling Funches that "the Mexican wouldn't give the money up and that's why they had to whip him." Given that evidence, and read in context, it was fair to infer that defendant was referring to the charged crimes,[10] and the trial court did not abuse its discretion in admitting this evidence or in revealing it to the jury given that it was substantive evidence. See 725 ILCS 5/115-10.1(a), (b), (c)(1) (West 2010). Although defendant alternatively also argues that submission of the transcript should have been limited to support only the felony murder trial, as discussed above, there was but one trial with three different charges here. Defendant's argument fails.

¶ 57 Along similar lines, defendant also argues the trial court erred in admitting the portion of defendant's videotaped confession referencing Vesey's armed robbery of an unknown man on August 24, just prior to the felony murder of Herrera. Defendant argues the statement indicates he was an accomplice to the uncharged offense or constituted inadmissible, other-crimes evidence, and therefore, the trial court should have granted his motion *in limine* to redact that portion of the videotape. Prior to trial, in response to the motion *in limine*, the State argued in part that this evidence was properly admissible in light of defendant's compulsion defense to the felony murder. The court agreed with the State, adding it also showed defendant's intent regarding the felony murder.

¶ 58 Again, we cannot say the trial court abused its discretion in so ruling. To establish compulsion, the defendant must show that in committing the felony, he was under an imminent

[10] Contrary to defendant's claim, the jury likewise never heard testimony that police were investigating a pattern of armed robberies up north, such that the jury would have inferred the robberies noted by Funches referred to anything else but the charged crimes.

threat of death or great bodily harm, which the person reasonably believed would be inflicted upon him if the conduct was not performed. *People v. Jackson*, 2016 IL App (1st) 133823, ¶ 40; *People v. Sims*, 374 Ill. App. 3d 231, 267 (2007). The defense is not available if the compulsion arises from the fault of the defendant or if the defendant had ample opportunities to withdraw from the criminal enterprise but failed to do so. *Sims*, 374 Ill. App. 3d at 267. Additionally, where the defense of compulsion is successfully asserted, the coercing party is guilty of the crime. *People v. Unger*, 66 Ill. 2d 333, 340 (1977). Once defendant raises this affirmative defense, and presents *some evidence* thereon, it's the State's burden to disprove it beyond a reasonable doubt. *Sims*, 374 Ill. App. 3d at 268.

¶ 59 Here, the jury's knowledge that defendant witnessed Vesey commit what appeared to be another armed robbery just prior to the Herrera murder was relevant and permissible in light of the defense raised and the State's burden. It showed that defendant could not have been under imminent threat to commit the charged crime of attempted armed robbery against Herrera, as an armed robbery had likely just been committed. Yet, defendant did not withdraw from the criminal enterprise. Rather, the prior incident established defendant intended to accompany Vesey in terrorizing innocent civilians through random robberies and, thus, disproved his compulsion while establishing his ultimate complicity in the Herrera felony murder. See *Wilson*, 214 Ill. 2d at 136 (other uncharged crimes may be admissible to show intent); *Banks*, 161 Ill. 2d at 137 (same). We also agree with the State that any prejudice in vaguely referencing another armed robbery by Vesey was far-outweighed by the probative value of the evidence. *King*, 384 Ill. App. 3d at 607. Likewise, any error relating to the above-referenced evidence was harmless in light of the substantial-to-overwhelming evidence of defendant's guilt with respect to all three charges, whether considered individually or altogether. *In re E.H.*, 224 Ill. 2d 172, 180 (2006)

(noting, evidentiary error is harmless when there is no reasonable probability that the jury would have acquitted the defendant without the error). Although there were no occurrence witnesses of the felony murder, defendant's confession coupled with his crime pattern with Vesey, the rental record evidence, and Funches' grand jury testimony all constituted substantial evidence of defendant's guilt.

¶ 60 *Admission of Photographs of the Deceased*

¶ 61 Defendant next contends the trial court erred in admitting photographs of Herrera's face and head wounds after the beating and also erred in sending these photos to the jury during deliberations. Defendant claims these images were more prejudicial than probative and irrelevant given that the issue at stake was not whether Herrera died but whether defendant was an accomplice to the crime. He asks that we reverse and remand the case.

¶ 62 Defendant specifically objects to the State's Exhibits 2 and 3, which are both photographs. The State sought to admit these images during the direct examination of Herrera's wife, Carmen, who testified that her husband was in critical condition and unrecognizable when she saw him on August 24, 2011, the day of the beating and after his surgery. Defense counsel stipulated to the admission of Exhibits 2 and 3, acknowledging they depicted Herrera in Stroger Hospital on September 1, 2011, days after the beating and about a month before Herrera died. Exhibit 2 depicts Herrera apparently unconscious with white gauze covering the top of his head, significant bruising over his closed right eye, a ventilator tube of some sort inserted in his mouth with tape over it to hold it in place. Exhibit 3 is a close-up image of Herrera's face, showing the same right eye, albeit with the bruise appearing to be a much deeper purple and the eye sealed shut, the ventilator tube and tape, as well as slight bruising to his left eye. At the jury instruction

conference, the trial court ruled, over defense counsel's objection, that the jury could view the State's exhibits 2 and 3 during deliberations.

¶ 63 While defendant now objects to the admission of these photographs, the State aptly notes that defendant not only failed to properly object below but affirmatively acquiesced to the admission of the photographs into evidence, thus forfeiting the matter on review. See *People v. Bush*, 214 Ill. 2d 318, 332 (2005) (when a defendant procures, invites, or acquiesces in the admission of evidence, even though the evidence is improper, he cannot contest the admission on appeal).

¶ 64 Forfeiture aside, defendant's claim still fails. Whether to admit photographs of the decedent into evidence and allow the jury to see them is a decision left to the discretion of the trial judge and will not be overturned absent an abuse of discretion. *People v. Brown*, 172 Ill. 2d 1, 40-41 (1996); *People v. Kitchen*, 159 Ill. 2d 1, 34 (1994). Reasons for admitting photographs of a decedent include proving the nature and extent of injuries, as well as the force needed to inflict them; the position, condition, and location of the body; the manner and cause of death; and also corroborating a defendant's confession and aiding in understanding a pathologist or other witness's testimony. *Kitchen*, 159 Ill. 2d at 35; *People v. Maldonado*, 402 Ill. App. 3d 411, 418 (2010). If photographs are relevant to prove facts at issue, they are admissible and can be shown to the jury unless their nature is so prejudicial and so likely to inflame the jurors' passions that their probative value is outweighed. *Brown*, 172 Ill. 2d at 41.

¶ 65 Here, the photos were relevant to show the nature and extent of Herrera's injuries, the force used to inflict them, and they also aided the jury in understanding both Carmen and the medical examiner's testimony. Just prior to the stipulation involving Exhibits 2 and 3, Carmen identified a photograph of defendant while he was alive and well. Exhibits 2 and 3 supported

Carmen's testimony that the beating was so severe that it rendered Herrera unrecognizable. The images also supported the medical examiner's testimony that Herrera died due to blunt head trauma and homicide. Likewise, in a case where there were no other witnesses to the beating, the photos corroborated defendant's confession. While it is true that defendant did not contest the injuries and cause of death at trial, the State was still required to prove the elements of the offense beyond a reasonable doubt even if defendant failed to contest the issue or stipulated to a fact. See *People v. Bounds*, 171 Ill. 2d 1, 46 (1995). Thus, the prejudicial effect of the photos did not outweigh their probative value, and the trial court did not abuse its discretion in admitting them or permitting the jury to view them during deliberations. See *People v. Richardson*, 401 Ill. App. 3d 45, 54 (2010).

¶ 66 Finally, even if the admission of the photographs were deemed erroneous, their admission was at worst harmless error. See *id*. As stated, the evidence against defendant regarding the charges was substantial if not overwhelming, and the outcome of the case would not have been different had the photos not been admitted. See *People v. Driskel*, 224 Ill. App. 3d 304, 315 (1991). This is especially true in light of the other photographic evidence admitted, including certain autopsy photos (Exhibits 4, 21, and 22), which defendant has not objected to on appeal. Further, the trial court was selective in determining which photos to admit, barring most of the other autopsy photos. Defendant's claim as to the photos fails.

¶ 67 *Improper Closing Argument*

¶ 68 Defendant next argues that the prosecutor made improper and inaccurate remarks during the State's closing argument and requests that we reverse and remand. The State initially responds that defendant failed to preserve this argument as to certain remarks by failing to object at trial or in his posttrial motion, thus giving rise to forfeiture. However, the fact that an objection

to certain remarks has been forfeited does not mean that we excise the forfeited remarks from our consideration; rather, we consider all of the closing arguments, including the context that can be supplied by the forfeited remarks while focusing on those remarks properly objected to.[11] *People v. Tatera*, 2018 IL App (2d) 160207, ¶ 59, relying on *People v. Wheeler*, 226 Ill. 2d 92, 122-23 (2007).

¶ 69 Turning to the merits, it is well settled that a prosecutor is allowed a great deal of latitude in closing argument and has the right to comment upon the evidence presented and upon all reasonable inferences, even if unfavorable to the defendant. *People v. Hudson*, 157 Ill. 2d 401, 441 (1993). The prosecutor may also respond to comments by defense counsel that clearly invite a response. *People v. Willis*, 2013 IL App (1st) 110233, ¶ 102. However, a prosecutor must refrain from making improper, prejudicial comments and arguments. *Hudson*, 157 Ill. 2d at 441. Even if a prosecutor's closing remarks are improper, they do not constitute reversible error unless they result in substantial prejudice to the defendant such that absent those remarks the verdict would have been different. *Id*. While it is not clear from supreme court precedent whether the appropriate standard of review for this issue is *de novo* or abuse of discretion, we need not resolve the matter, because our holding in this case would be the same under either standard. *Alvidrez*, 2014 IL App (1st) 121740, ¶ 26; *but see People v. Cook*, 2018 IL App (1st) 142134, ¶¶ 61-64 (finding the standard of review clear). That is, viewing the remarks in the context of the entire closing argument, as we must, we conclude there was no reversible error committed for the following reasons. See *Alvidrez*, 2014 IL App (1st) 121740, ¶ 26.

[11] While the State argues that plain error review is not available to defendant regarding certain unpreserved remarks because defendant did not argue plain error in his opening brief, we note that, regardless, we would find no plain error since (1) there was no error at all, or (2) as later discussed, to the extent there was any minor error, it was not so serious as to challenge the integrity of the judicial process, and the evidence was not closely balanced such that the error threatened to tip the scales of justice. See *Alvidrez*, 2014 IL App (1st) 121740, ¶¶ 25, 33. We note that arguments not raised in the opening brief cannot be raised in the reply brief. See Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018).

¶ 70 Defendant specifically complains that the prosecutor improperly urged the jury to consider invalid other-crimes evidence, namely the felony murder and the armed robbery of Hasan, in ruling on the Hawkins' armed robbery. The prosecutor stated, "Additionally you can use the evidence of the other armed robbery in this case and the attempt armed robbery in this case or in these cases to show that [defendant] committed this armed robbery because *that's what he does*." (Emphasis added.) Following defense counsel's objection, which the court overruled, the prosecutor noted that the jury would receive an instruction that the jury could "use the other armed robbery *** and the attempt armed robbery" for identity and intent, and concluded "[s]o, we've met those propositions."

¶ 71 As previously stated, the State presented evidence linking the three different charged crimes and also showed there was a common method of operation and motive in committing them such that they were all part of the same comprehensive transaction for purposes of joinder. As such, the State's argument that the other two charged crimes could be considered to show defendant committed the armed robbery against Hasan was properly grounded in the evidence, which demonstrated that defendant and Vesey were engaged a larger criminal endeavor of hitting licks or committing armed robberies over the course of 10 days. For that reason, as well, the prosecutor's comment, noting "that's what he does," was not improper. Regardless, while defendant urges that the prosecutor was improperly arguing propensity evidence, read in context, it appears the prosecutor was seeking to establish defendant's identity and intent in committing the Hawkins crime.

¶ 72 Defendant also argues the prosecutor, in closing and rebuttal, disparaged the defense and improperly suggested defendant fabricated his defense. He first points to remarks wherein the prosecutor referred to defendant's compulsion defense as "an excuse" and as defendant's

"attempt to get out from under this case, to avoid responsibility and you know what, it doesn't hold water." In rebuttal, the prosecutor again referred to the compulsion defense as "childish" and essentially compared defendant to a child who claimed not to have taken "the cookie from the cookie jar," but when confronted that he had "crumbs" on his shirt, stated that another kid "made" him "do it." Defendant further complains about the State's comments that his alibi witness was "ridiculous" and "an insult to [the jury's] intelligence," among other things. And, finally, defendant complains about the prosecutor's rebuttal comments, noting that defendant initially denied involvement in the murder, but when police informed him they had talked to Funches, defendant began to cry. The prosecutor argued that this showed Funches' grand jury testimony to be truthful because defendant knew "Funches would implicate him."

¶ 73 We agree with the State that in the above-stated instances, the prosecutor was challenging the plausibility of the defense theory and also defendant's credibility as to coercion (as set forth in his confession) based on the evidence at hand, rather than accusing defense counsel of any fabrication or trickery. See *People v. Kirchner*, 194 Ill. 2d 502, 550 (2000) (noting, the State may challenge a defendant's credibility and the credibility of the defense theory in closing argument when there is evidence to support such a challenge). This was proper, even if the comments were unfavorable to defendant. The State was likewise making fair comment in response to defense counsel's closing argument with regard to both his compulsion and alibi defenses, specifically pointing to the inconsistencies in the alibi testimony. See *People v. Franklin*, 135 Ill. 2d 78, 112 (1990) (it is proper to comment on the illogical nature of defense counsel's argument). Likewise, the prosecutor was making fair comment in response to defense counsel's closing argument challenging Funches' credibility. See *id*. Moreover, where necessary, the trial court sustained defense counsel's objection, ordering the jury to disregard the comment; the court properly

instructed the jury; and the court informed the jury that closing arguments are not evidence, all alleviating any possible prejudice. See *People v. Kliner*, 185 Ill. 2d 81, 159 (1998); *People v. Gonzalez*, 388 Ill. App. 3d 566, 598 (2008).

¶ 74 Finally, defendant argues that the prosecutor misstated the evidence, by referencing defendant's flight from police. The prosecutor stated during argument that "police had to chase him down to arrest him," and in rebuttal, the "only reason [defendant] came into contact with the police is because the police found him and even then, he tried to run." The defense's objections in both instances were overruled. The State now argues these comments were metaphorically made and, when read in context, referred to defendant's desire to escape responsibility for the crimes (as in his coercion defense), a claim we find to be a stretch. As defendant notes, Sergeant Ciccola explicitly stated that defendant did not attempt to run from police after he was stopped. Even assuming the prosecutor misstated the evidence, however, it does not constitute reversible error. The comment was made in passing on what is undeniably a collateral matter. See *Alvidrez*, 2014 IL App (1st) 121740, ¶ 29. The focus of the trial was on the victims' accounts of the armed robberies and defendant's various incriminating statements. And, again, any error was cured by the court's instruction to the jury before and after closing that arguments are not evidence. See *id*. In short, the inaccuracy on the State's part was not outcome determinative and did not contribute to defendant's conviction. See *People v. Hawkins*, 243 Ill. App. 3d 210, 228 (1993). For all of the foregoing reasons, defendant's claim as to prosecutorial misconduct during closing arguments fails.

¶ 75 CONCLUSION

¶ 76 Having found defendant's claims on appeal meritless, we affirm the judgment of the trial court finding defendant guilty of the three charged offenses and sentencing him to life in prison.

¶ 77 Affirmed.