Order filed
September 5, 2018.
Modified upon denial of
rehearing September 28, 2018.

2018 IL App (5th) 170328-U

NO. 5-17-0328

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	St. Clair County.
	)	
v.	)	No. 12-CF-848
	)	
DARRIUS CRUMP,	)	Honorable
	)	Robert B. Haida,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CATES delivered the judgment of the court.
Justices Chapman and Moore concurred in the judgment.

ORDER

¶ 1 *Held*: Defendant was properly convicted of five counts of aggravated battery in light of the evidence presented at trial. Additionally, neither the alleged errors made in closing argument nor defense counsel's alleged ineffective assistance warranted reversal of those convictions.

¶ 2 Defendant was convicted of five counts of aggravated battery with a firearm (720 ILCS 5/12-3.05(e)(1) (West 2012)), a Class X felony (720 ILCS 5/12-3.05(h) (West 2012)). Defendant originally was sentenced only on two of the five counts. After his cause was remanded to the circuit court of St. Clair County with directions that a complete judgment be entered (see *People v. Crump*, 2017 IL App (5th) 130556-U), the circuit court, on June 14, 2017, sentenced defendant on all five counts. Specifically,

defendant was sentenced to three consecutive six-year sentences of imprisonment and two concurrent six-year sentences. The court concluded that the acts underlying the first three counts constituted serious bodily injury, and that consecutive sentences were needed to protect the public. On this appeal, defendant raises three issues. He first argues that the State failed to prove him guilty of one of the aggravated counts, specifically count V pertaining to defendant having shot the victim in the arm. Defendant further contends that, during closing argument, the State misstated facts and the applicable law, thereby denying him a fair trial. For his last point on appeal, defendant asserts that he was denied the effective assistance of trial counsel. We affirm.

¶ 3 On the evening of June 5, 2012, defendant and the victim, Cortez Mason, got into a verbal argument outside defendant's home. The argument turned physical, and the two men started shoving each other. Defendant saw the victim "forever reaching" for something from his belt area. Defendant, allegedly fearing that the victim had a gun, took out a revolver and fired shots several times in the victim's direction. When the police arrived at the scene of the shooting, they found the victim in the middle of the street. The victim was transported to the hospital with multiple gunshot wounds, one to his chest, two to his abdomen, one to his right leg, and one to his right arm. A revolver recovered from the scene contained six empty shell casings.

¶ 4 A resident of the neighborhood, Sharon Bullard, called the police shortly after the shooting and reported that a man who she knew as "D" walked up to her and asked if he could wash his hands in her home. She refused, and "D" grabbed her before walking away. When the police arrived, they found a man attempting to flag down a car. As they

approached him, the man got into the back seat of the car. The police stopped the car and arrested the man who had just gotten in the back seat. That man was defendant. Bullard also identified defendant as the man who had grabbed her.

¶ 5 Because defendant was intoxicated when arrested, he was not interviewed until the next day. Defendant admitted to the police during his interrogation that he had emptied his gun of all live rounds when he shot the victim. He also told the police that he and the victim had been drinking together. Defendant explained that he believed the victim had previously set him up for a robbery a week or two earlier, and he also believed the victim was responsible for a number of robberies in the area and often carried a weapon. When the victim began reaching for something from his belt area, defendant believed the victim had a gun. Fearing for his safety, defendant fired several shots from his revolver in rapid succession towards the victim. The victim, on the other hand, testified that defendant accused him of setting him up for a robbery and just began shooting at him. While he related he used to carry a gun, the victim denied having a weapon on him that evening or even touching defendant. The jury found defendant guilty of all five counts of aggravated battery with a firearm.

¶ 6 Defendant first argues on appeal that the State failed to prove him guilty of shooting the victim in the arm (count V). He points out that the State bears the burden of proving each material and essential element of an offense (see *People v. Weinstein*, 35 Ill. 2d 467, 470 (1966)). Defendant claims that, in this instance, there was no evidence that the injuries the victim suffered to his arm and torso were not both part of a single act. Defendant argues the State must establish that each of the victim's injuries was caused by

an independent act performed by defendant. Because the failure to prove a material allegation of an indictment beyond a reasonable doubt is fatal to the judgment of conviction (see *People v. Tassone*, 41 Ill. 2d 7, 11 (1968)), defendant believes his conviction for count V should be vacated.

¶ 7 In order for a defendant to achieve reversal of a conviction, that defendant must show that the evidence was so improbable or unsatisfactory that a reasonable doubt of his guilt remains. *People v. Smith*, 185 Ill. 2d 532, 542 (1999). Here the State presented evidence that the victim was shot five separate times while defendant's theory that a single bullet caused multiple entry wounds is purely conjectural. The victim claims he was shot five times, and the treating physician confirmed that the victim received five gunshot wounds to his body. Defendant admitted to the police he emptied his gun of all live rounds when he shot at the victim. The police found no live rounds in the gun and found six empty shell casings. The jury is in a superior position to determine witness credibility, assign weight to the testimony, and resolve conflicts in the evidence. *People v. Emerson*, 189 Ill. 2d 436, 475 (2000). In this instance, the jury determined that the State met its burden of proving defendant guilty of each of the charged offenses. Considering the evidence in the light most favorable to the State (*People v. Cunningham*, 212 Ill. 2d 274, 278 (2004)), we affirm defendant's conviction on count V.

¶ 8 For his second point on appeal, defendant claims that during closing argument the State misstated facts and the applicable law, thereby denying him a fair trial. Defendant points to three specific instances: the State erroneously told the jury that defendant robbed the victim; the State erroneously argued that it would have been difficult for

defendant to have fired several shots in rapid succession; and that defendant should have just run away and a not guilty verdict under the circumstances would signal that it was permissible to shoot someone who has a bad reputation.

¶ 9 The State is permitted wide latitude in closing argument, and may comment on the evidence and any fair, reasonable inferences drawn from that evidence. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009); *People v. Smith*, 141 Ill. 2d 40, 60 (1990). Prosecutorial misconduct in closing argument warrants a new trial "only if *** the improper remarks were so prejudicial that real justice was denied or that the verdict resulted from the error." *People v. Runge*, 234 Ill. 2d 68, 142 (2009). Whether comments made by the prosecution in closing argument are so egregious as to warrant a new trial is a question of law that is reviewed *de novo*. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007).

¶ 10 Turning to the first alleged instance of prosecutorial misconduct, defendant contends that during closing argument the State told the jury that defendant robbed the victim. As the State pointed out, the evidence indicated that when the police arrived at the scene of the shooting, there was a blood-like substance in the street, on defendant's hands, and on the trigger of the gun that allegedly was used to shoot the victim. The State inferred that the smeared blood on defendant's hands and gun was a result of defendant going through the victim's pockets as he lay bleeding on the road. Defendant claimed he was acting in self-defense when he shot the victim, and points out that no witness testified defendant went through the victim's pockets nor did the victim testify that anything had been removed from his pockets. When defense counsel objected to the

State's argument, the court concluded the State's comments were reasonable inferences from the evidence and proper rebuttal to defense counsel's closing argument that defendant was bloodied in the physical altercation with the victim. We agree. There was no evidence of a fistfight between defendant and the victim prior to the shooting. Moreover, smeared blood was not consistent with the manner in which blood would be expected to appear on defendant's hands as a result of a fistfight or gunshots. Statements made in closing argument are not improper if provoked or invited by defense counsel's argument. See *Glasper*, 234 Ill. 2d at 204. We also note that at no point in the trial did the State argue that defendant shot the victim as part of a robbery. The State's argument was reasonable under the circumstances presented.

¶ 11 Defendant next finds fault with the State's argument that it was difficult for defendant to have fired several shots in rapid succession and that a revolver requires more force to pull the trigger. Defendant asserts there was no evidentiary support for such statements. As the State counters, a jury does not need testimony from an expert witness to know that a revolver requires individual trigger pulls as opposed to one pull that instantly discharges six bullets. We agree and find no error in the prosecution's argument.

¶ 12 For his third attack on closing argument, defendant argues the State shifted the burden on self-defense by arguing that defendant should have just run away, even though he had no legal duty to retreat, and that a not guilty verdict would have signaled that it was permissible to shoot someone who has a bad reputation. As the State counters, the prosecutor was focusing on defendant's claim that he had no choice but to pull out a gun

and shoot at the victim. Defendant did not have to stay in an argumentative situation. Defendant also described the victim as forever reaching, thus giving defendant the opportunity to leave. We first note that defendant's objections to the prosecutor's comments were sustained. Such errors typically are cured when the court sustains the objection and the court properly instructs the jury, as occurred here. See *People v. Sims*, 167 Ill. 2d 483, 512 (1995). Secondly, the evidence was not closely balanced in this instance. Defendant himself admitted he shot the victim multiple times. While defendant admitted he did not trust the victim, he never stated he generally was in fear of the victim. Furthermore, defendant did not claim that he saw the victim with a gun that day, and never stated that the victim threatened to shoot him during the incident. The jury's verdict was based on the evidence, and defendant did not suffer sufficient prejudice to require reversal of his convictions.

¶ 13 For his final point on appeal, defendant argues he was denied the effective assistance of trial counsel when his attorney submitted an incomplete self-defense instruction. Defendant asserts the instruction was incomplete because it failed to inform the jurors that defendant could defend himself by causing great bodily harm if he reasonably believed that he would be a victim of a forcible felony. See Illinois Pattern Jury Instructions, Criminal, No. 24-25.06 (4th ed. 2000) (hereinafter IPI Criminal 4th No. 24-25.06). Defendant, relying on *People v. Thomas*, 407 Ill. App. 3d 136 (2011), points out that he did not have to suffer an injury in order for an offense to qualify as a forcible felony. See *Thomas*, 407 Ill. App. 3d at 140. According to defendant, a forcible felony only requires the use or threat of physical force or violence. *Thomas*, 407 Ill. App. 3d at

140. In this instance, defendant asserts that what began as a verbal argument turned into a physical confrontation. Each of the men began shoving the other, and at one point defendant believed the victim was going to pull out a gun. The victim was known to carry a gun, and defendant believed that the victim had set him up for a robbery just days earlier. Defendant believes that if his attorney had asked the court to include the forcible felony language in the instruction given to the jury, there was a reasonable probability that the jury would have concluded that defendant acted in self-defense.

¶ 14 The State counters the self-defense instruction given to the jury did not prejudice defendant and accordingly there was no ineffective assistance of counsel. To establish deficient performance of defense counsel, a defendant must show his or her attorney's performance fell below an objective standard of reasonableness. Additionally, such deficient performance must be shown to have prejudiced the defense. See *People v. Evans*, 209 Ill. 2d 194, 219 (2004). Prejudice is established when a reasonable probability exists that, but for counsel's deficient performance, the result of the proceedings would have been different. *Evans*, 209 Ill. 2d at 220. The jury here was instructed on both paragraphs of IPI Criminal 4th No. 24-25.06, but not, as defendant points out, on whether the use of force which was likely to cause death or great bodily harm was necessary to prevent a forcible felony. Defendant does not say what forcible felony should have been included in the instruction. Given that the victim was not armed, that the victim did not display a weapon, and that the victim did not use or threaten a weapon at any time during the incident, it is rather difficult to state what particular forcible felony would have been appropriate under the circumstances. More

importantly, there is no reason to believe that the result of the trial would have been any different had defense counsel added the forcible felony provision. The jury's verdict necessarily rejected the idea that defendant reasonably believed the victim was engaged in some felonious act that was likely to cause imminent threat of bodily harm or death. Having suffered no prejudice, we, accordingly, find no ineffective assistance of counsel as a result of the instruction tendered to the jury in this instance.

¶ 15 For the foregoing reasons, we affirm the judgment of the circuit court of St. Clair County.

¶ 16 Affirmed.