SIXTH DIVISION
March 29, 2019

No. 1-12-2397-UB

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 19414
	)	
EDDIE DOUGLAS,	)	Honorable
	)	Brian K. Flaherty,
Defendant-Appellant.	)	Judge Presiding.

JUSTICE HARRIS delivered the judgment of the court.
Justices Cunningham and Connors concurred in the judgment.

ORDER

¶ 1 *Held:* We affirm defendant's conviction where the State disclosed the knife recovered at the victim's house to defense counsel prior to trial, and defendant was not prejudiced by the misplacement of a surveillance videotape or by the prosecutor's comments. Defendant's claim of ineffective assistance of trial counsel for failing to investigate the knife cannot stand where there was no physical evidence connecting the knife to the crime, and the evidence against defendant was overwhelming.

¶ 2 This court considers defendant's appeal a second time, as we previously remanded the cause for an evidentiary hearing on defendant's *Brady* claim. See *People v. Douglas*, 2017 IL App (1st) 122397-U. We will address defendant's *Brady* claim, and the remainder of his contentions on appeal, below.

¶ 3 Defendant, Eddie Douglas, appeals his conviction after a jury trial of attempted first degree murder and home invasion. On appeal, defendant contends (1) his due process rights were violated when the State concealed the existence of a knife that police recovered from the victim's home seven months before trial; (2) the trial court erred in not giving Illinois Pattern Jury Instructions, Civil, No. 5.01 (IPI No. 5.01), where the Calumet City Police Department failed to preserve a surveillance video recording taken from defendant's place of employment; (3) he was denied a fair trial where the prosecutor called defendant "garbage" in rebuttal closing argument; and (4) his trial counsel provided ineffective assistance when he failed to investigate the recovered knife. For the following reasons, we affirm.

¶ 4 JURISDICTION

¶ 5 The trial court sentenced defendant on June 25, 2012. This court allowed defendant to file a late notice of appeal on September 17, 2012. Accordingly, this court has jurisdiction pursuant to Article VI, section 6, of the Illinois Constitution (Ill. Const. 1970, art. VI, §6) and Rule 603 (eff. Oct. 1, 2010) and Rule 606 (eff. Mar. 20, 2009), governing appeals from a final judgment of conviction in a criminal case entered below.

¶ 6 BACKGROUND

¶ 7 Defendant was charged with attempted first degree murder, home invasion, aggravated domestic battery, and aggravated battery in connection with an incident that occurred on October 22, 2007. Prior to trial, defendant filed a motion for sanctions in which he requested dismissal of the case with prejudice. In the motion, defendant argued that the destruction of his employer's surveillance videotape violated his right to due process. At the hearing on the motion, defendant called Doreen Pierce who stated that she worked with defendant at the Baymont Inn on 147th Street in Calumet City. Although Pierce had no recollection of October 22, 2007, her notes show

that defendant, who worked as a security guard, left at either 4:00 or 5:00 a.m. She further stated that after defendant left work, he typically called her when he got home to make sure everything was "all right."

¶ 8 Pierce testified that on October 23, 2007, the police came to the Baymont Inn and took a surveillance videotape covering the stairwell, front door, side doors, front desk, elevator, and the outside of the building. She stated that to the best of her knowledge, the videotape shows those areas. In response to questioning, Pierce agreed that she had not "had any opportunity to view the entire tape" nor did she review the tape. When asked whether she "just tendered a copy of the tape," Pierce responded, "Yes." Defendant argued that the videotape was "the most important piece of evidence in this entire case" because it would show whether defendant "was at work or that he wasn't at work." The Calumet Police Department acknowledged that they took possession of the videotape but now it cannot be located. Defendant asked that the case be dismissed, "or in the alternative that videotape should be presumed to show that Mr. Douglas in fact was at work."

¶ 9 The State argued that although the police department should have "maintained custody" of the videotape, police who viewed the video would testify that the video recording was scrambled and distorted, and no images were visible. The State further argued that defendant failed to show the evidence was obviously exculpatory or that it was lost in bad faith. Also, other evidence, including DNA evidence and the victim's testimony, connected defendant to the crime. The State argued that the loss of the evidence may arguably indicate negligence, which "may very well be persuasive in the area of cross-examination to a trier of fact," but it does not rise to the level of bad faith supporting dismissal of the case.

¶ 10 After argument, the trial court found that the police officers did not act in bad faith and therefore the sanctions defendant requested are "too severe and not appropriate" in this situation.

The court denied defendant's motion, but stated that this issue "is a ripe area for cross-examination of all the detectives that handled the tape and that saw the tape" and "ripe for argument to the jury."

¶ 11 At trial, Isidra Martinez testified that she and defendant married in March of 2005. While they were married, they lived with Isidra's parents at 715 Sibley Boulevard in Calumet City, along with Isidra's three children. Her youngest child was defendant's son. Isidra and defendant slept in the basement bedroom of the house. The house had an alarm system covering the front and back doors, but it was never turned on until defendant moved out in April 2007. When he lived in the house, defendant replaced a few windows in the kitchen and the guest bedroom on the first floor. After defendant moved out in April 2007, Isidra continued to sleep in the basement bedroom and her youngest child slept with her. Her two older children slept in a bedroom on the first floor and the other bedroom on the first floor was a guest room. Isidra's parents slept in a bedroom on the second floor. In July of 2007, Isidra filed for divorce. Although defendant "begged" her to work out their issues, Isidra continued with the divorce proceedings.

¶ 12 On October 21, 2007, Isidra, who was at home with her parents and children, went to bed around 10:00 p.m. Close to 5:00 a.m., Isidra heard a noise in the dark and decided to check it out. As Isidra left her bedroom and walked into the hallway, she "was hit in the head." Isidra struck back, hitting the person in the chest, body, and head. Isidra testified that as she fought her attacker, she recognized "the smell of" defendant. She fell to the floor "kicking and screaming" and then she "blanked out for a minute." When she "came to" and opened her eyes, she saw defendant "running up the first landing of stairs." When he got to the landing where the door was located, Isidra could see defendant's "build" and "the structure of his face."

¶ 13 Isidra screamed for help and ran into her bedroom to retrieve a decorative knife to defend herself. While she was in the bedroom, Isidra saw that her son was awake and staring at her stomach. She looked down and saw a "bulge coming out" of her stomach "like [her] insides" of her stomach, and she was bleeding. She dropped to her knees, crying, and used a pillow to hide the wound from her son. Isidra managed to use a land line to call 911, and she used a cell phone to call her mother who was sleeping upstairs. She warned both the 911 dispatcher and her mother that defendant could still be in the house. When the 911 operator asked her if she knew who attacked her, Isidra responded that it was defendant. Isidra suffered nine stab wounds to her stomach, the left side of her thigh, her left arm and her knee. She was transported to a hospital in Olympia Fields where she had multiple surgeries to repair her diaphragm, lungs and liver.

¶ 14 Lillie Ajao, Isidra's mother, testified that she woke that morning to a noise but ignored it. She then heard her grandchildren screaming and someone running through the house. Her daughter called her cell phone and told her that "somebody is in the house, hurry up, get to the kids." Lillie grabbed a firearm and went downstairs. At this time, the police were at the front door and Lillie let them in. When she opened the door to let the police inside, the house alarm went off. The alarm had not gone off before this time.

¶ 15 James Randall testified that he was a Calumet City police officer, and on the morning of October 22, 2007, he responded to a report of a stabbing at 715 Sibley. Lillie let the officers inside the house and no offenders were found in the house. Officer Randall found Isidra on the floor of her bedroom with "a pillow clutched to her abdomen." A small child was also in the bedroom, and he saw blood on the pillow, floor, and the mattress. Isidra told Officer Randall that defendant stabbed her. Officer Randall noticed that the window in the first floor guest bedroom

was open. Evidence established that the bottom of the window was seven feet above the ground on the outside of the house.

¶ 16 Officer William Coffey testified that on October 22, 2007, around 5:30 a.m., he went to 294 Bensley in Calumet City to locate defendant. This apartment was approximately one and a half miles from Isidra's house. When Officer Coffey arrived at the apartment, he noticed a blue Aerostar van that was "hot to the touch." When he took defendant into custody, he did not find any bloody clothes and did not see any blood on the bed he was lying in. Officer Jeff McBrayer took DNA samples from defendant that morning.

¶ 17 Detective Mitch Growe investigated the stabbing on October 22, 2007, and went to 715 Sibley where he "observed there was a bedroom where the point of entry was made." He also believed the offender exited the house from the same bedroom. He noticed "a black knit hat kind of underneath the bed" in that bedroom, near the window where the offender would have entered and exited. The hat was like a "scull cap where the eyes were cut through here, so kind of like a makeshift ski mask." No fingerprints were recovered from the window. While the hat and other evidence was sent for testing, Detective Growe released defendant on October 23, 2007, because "we wanted the results of that before we actually went through and charged, so we were still conducting the ongoing investigation." Forensic scientists determined that the knit cap recovered from the guest bedroom contained a mixture of DNA from two people, with the major contributor to the DNA profile being defendant. Defendant was taken into custody and charged with attempted murder and home invasion. The State then rested, and defendant moved for a directed verdict which the trial court denied.

¶ 18 Doreen Pierce testified for the defense. Pierce and defendant worked at the Baymont Inn. She stated that on October 21st into the 22nd, defendant was working, leaving at 4:30 a.m. on the

22nd. Pierce knew when he left work because he had to check with her when he wanted to leave. After defendant left, he called Pierce at 5:05 a.m. to check if everything was alright. She also testified that the Baymont Inn has a video surveillance system that records images onto videotape. She stated that the system was working on October 21st and October 22nd. The police looked at the video on October 22, 2007, and Pierce testified that she also looked at the tape when the officers looked at it. On cross-examination, Pierce acknowledged that she had stated previously in court that she had not viewed the videotape. She also acknowledged that she did not know where defendant was calling from when he called to check on her.

¶ 19 Louise Douglas testified that she is defendant's mother and on October 21, 2007, she was at home at 294 Bensley with defendant. He left for work around 5:30 p.m. and returned at 4:45 a.m. the following morning. Douglas was asleep when he came home, but he knocked on the door and she let him in. Defendant appeared normal and after making a phone call, he went to sleep. Around 5:30 a.m., the police came to the door and she let them inside. She told them that defendant was in the house. Defendant left with the officers, and the officers searched the apartment taking keys and a cell phone. On cross-examination, Douglas admitted that she told officers when they came to her apartment that no one was inside other than herself, but then they found defendant inside.

¶ 20 In rebuttal, Officer Coffey testified that when he went to the Bensley apartment, Douglas answered the door and told him that "no one should be inside." Douglas allowed him to enter and Officer Coffey found defendant awake in the rear bedroom. Douglas did not say what time she thought defendant had arrived home that morning.

¶ 21 Before closing arguments, defense counsel offered IPI No. 5.01, which allows the jury to infer that evidence which a party fails to produce would be adverse to that party. The trial court

declined the instruction over defense counsel's objection. The court noted that before giving the instruction, it must determine that the party would have produced the evidence except for the fact that the evidence would be unfavorable. It found the instruction inapplicable because it is an instruction dealing with the failure to produce evidence, not a burden-of-proof instruction dealing with spoliation, and the State did not "[do] anything to that evidence. They did nothing to cause the evidence not to be here or cause anything in that tape not to be on that tape." The court also questioned whether a civil jury instruction was appropriate for use in a criminal case.

¶ 22 The jury found defendant guilty of attempted first degree murder and home invasion. Defendant filed a motion for a new trial which the trial court denied. The trial court sentenced defendant to consecutive terms of 10 years' imprisonment for home invasion, and 20 years' imprisonment for attempted first degree murder. Defendant filed his timely appeal.

¶ 23 ANALYSIS

¶ 24 I. Brady Violation

¶ 25 Defendant argued on appeal that he is entitled to a new trial because the State concealed the existence of a knife recovered by police seven months before trial, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). The State responded that the record was unclear on whether this evidence was actually disclosed to defense counsel prior to trial. In *Douglas*, 2017 IL App (1st) 122397-U, this court remanded the cause to the trial court for an evidentiary hearing on whether the knife was in fact disclosed to defense counsel and if so, when and the manner in which it was disclosed.

¶ 26 At the evidentiary hearing, Assistant State’s Attorney Lorraine Lynott Murphy testified that she was first assigned to the courtroom in January 2011, and defendant’s case had already been set for trial. She appeared in court on behalf of the State on January 13, 2011, although the

transcript on that date indicated ASA Kelly Grekstas was the attorney appearing on behalf of the State.

¶ 27 ASA Murphy testified she informed the court on January 13, 2011, as reflected in the transcript, that she "tendered additional police reports. There is a lab I still need to obtain before setting this." ASA Murphy testified that the reports referred to in the transcript were generated by the Calumet City police after they returned on December 9, 2010, "to the victim's home and recovered a knife that the family had recently discovered." The reports indicated that the knife was discovered by Isidra's father when he was preparing the back stairway for re-tiling. "The knife was sitting under a piece of loose wood on the underside of the landing," and no one in the house had knowledge of the knife. An evidence technician photographed the area, removed the knife, and "[t]he knife was then packaged and entered into evidence under number 10-1770." After ASA Murphy stated she tendered the additional police reports, the transcript shows that defense counsel responded, "I do acknowledge receipt of that, your Honor."

¶ 28 She identified People's exhibit No. 2 as a true and accurate copy of the Calumet City police report she tendered to defense counsel on January 13, 2011, and People's exhibit No. 3 as a true and accurate copy of a DVD containing photographs that she also tendered on that date. ASA Murphy testified that after she tendered the material, she informed defense counsel that she was awaiting a lab report on the knife. She subsequently tendered a fingerprint report and a biology report to defense counsel prior to trial. No blood was detected on the knife and "no latent prints suitable for comparison" were found. Although the lab reports indicated they were written on January 3, 2011, ASA Murphy stated that she did not yet have the reports on January 13th. She did not know if there was a discovery receipt for the reports or DVD, but admitted it was standard procedure for the State's Attorney's office to have such receipts. However, she

emphasized that all lab reports were tendered to defense counsel prior to trial. By stipulation, the lab reports (People's exhibit Nos. 4 and 5) were admitted into evidence.

¶ 29 On cross-examination, ASA Murphy testified that she did not learn of the mistake in the transcript naming ASA Grekstas as the state's attorney until after this court remanded the cause for a hearing. She explained that ASA Grekstas was no longer assigned to the courtroom at that time and she did not remember her being in court that day. ASA Murphy reiterated that she tendered the DVD with the police reports to Ward, but acknowledged that the transcript did not specifically indicate that the DVD was tendered. ASA Murphy did not introduce the knife at trial in June of 2011 because "there was no physical evidence on the knife linking it to this crime" so she believed it was not relevant. She "didn't think it had anything to do with this crime."

¶ 30 Defendant filed a memorandum supported by a sworn, notarized affidavit from his trial counsel, Anderson Ward. The affidavit stated that Ward "became aware of the knife and other reports, as a result of [defendant's] appeal. Such was not known or made available during his trial." Defense counsel on remand referred to the affidavit in his argument before the court, and the trial court sustained the State's objection. The court stated it would not accept the affidavit, but if counsel "want[s] to put on evidence, [Ward] has to testify right here" so that the State has an opportunity to cross-examine him. Defense counsel responded, "Okay, Judge. I think we can still look at other things." At the conclusion of defense counsel's argument, the court returned to the issue of Ward. The court asked defense counsel, "You brought up Mr. Ward. Is it your desire not to call Mr. Ward in this hearing?" Counsel answered, "It is my desire not to call Mr. Ward." Counsel stated that she discussed the issue with defendant, and when the court asked defendant whether he agreed with the decision not to call Mr. Ward he responded, "Yes, sir."

¶ 31 The court issued its findings. It found that on January 13, 2011, ASA Murphy appeared in court, not ASA Grekstas. It believed the court reporter simply made a mistake which is reflected in the transcript. Pointing to the transcript, the court found that the police reports on the knife recovered at 715 Sibley Boulevard "were tendered to Defense Counsel Ward" on January 13, 2011. The court found that the DVD containing the photos taken of the knife was also tendered to Ward on January 13, 2011, because Ward acknowledged that he received the police reports. A report dated December 23, 2010, showed that no blood was found on the knife although hair, fibers and debris were observed. No latent fingerprints were found for comparison.

¶ 32 The trial court found ASA Murphy to be a "truthful and credible" witness when she testified that the police reports and labs were tendered to defense counsel Ward, and concluded that "he possessed these reports when the matter went to trial." The court determined that "[t]he time frame regarding the recovery of the knife, lab results and the court appearance on January 13, 2011" indicates "that there was no Brady violation in this matter. That the knife was recovered, labs generated, and the reports tendered. The disk of the photos and eventually the lab were tendered to the defense attorney."

¶ 33 On appeal, defendant first challenges the trial court's determination that ASA Murphy was the prosecutor in the case rather than ASA Grekstas, who was named in the transcript. He argues that this court's mandate was to conduct an evidentiary hearing on the knife, not to amend the record on appeal which may only be done through a Rule 329 motion. We note, however, that the trial court did not order a correction of the record. It merely found, for purposes of the evidentiary issue on remand, that ASA Murphy was the state's attorney in the case instead of ASA Grekstas.

¶ 34 Regardless of which state's attorney was present in court that day, the transcript supports the trial court's finding that prior to trial, defense counsel received the police reports on the knife found at Isidra's residence. Police went to Isidra's residence on December 9, 2010, to investigate a knife found by Isidra's father. In the transcript of the hearing on January 13, 2011, the state's attorney tells the court, "I've tendered additional police reports." Ward responds, "I do acknowledge receipt of that, your Honor." Since the knife was disclosed to counsel, no *Brady* violation occurred. *People v. Uselding*, 217 Ill. App. 3d 1063, 1074 (1991) (a *Brady* violation occurs when material is not disclosed and is of such a character that the result of the proceedings would have been different).

¶ 35 Defendant also contends that the State failed to disclose the DVD and the lab reports in violation of *Brady*. He has not, however, shown how the result of the proceedings would have been different with the materials which he asserts were not disclosed. The DVD contained only photos taken of the knife and where it was found at Isidra's residence. The lab reports indicated that no blood was detected on the knife, and no usable fingerprints were recovered for comparison. This evidence did not connect the knife to the crime.

¶ 36 Defendant, however, argues that ASA Murphy's testimony on this issue was "incredible" because the transcript of the proceedings does not specifically state the DVD was given to Ward, only that the police reports were tendered. The trial court found that the DVD was part of the police report and as such, it was tendered to defense counsel at the same time the report was tendered. The trial court's finding was not against the manifest weight of the evidence, even if the transcript did not explicitly state that Ward received the DVD along with the police reports. A determination is against the manifest weight of the evidence only if the opposite conclusion is clearly evident. *People v. Wells*, 403 Ill. App. 3d 849, 854 (2010).

¶ 37 Defendant also questions ASA Murphy's credibility when she testified that she gave Ward the lab reports prior to trial, but she did not know if there were discovery receipts for the reports. He argues that ASA Murphy's testimony was further impeached by Ward's affidavit, in which he stated that he did not receive the lab reports. ASA Murphy testified at the hearing and defense counsel had an opportunity to cross-examine her. The court found ASA Murphy to be a truthful and credible witness, and determined that she tendered the reports to Ward prior to trial. The trial court is in the best position to judge the credibility of witnesses, and a reviewing court will not substitute its judgment for that of the trial court regarding the weight of their testimony or their credibility. *People v. Siguenza-Brito*, 235 Ill. 2d 213, 224-25 (2009).

¶ 38 Although defendant refers to Ward's affidavit, the trial court did not allow that evidence without Ward testifying at the hearing so that the State could cross-examine him. Defense counsel responded, "Okay, Judge. I think we can still look at other things." At the conclusion of defense counsel's argument, the court again asked counsel whether she wanted to call Ward as a witness and counsel answered, "It is my desire not to call Mr. Ward." Counsel stated that she discussed the issue with defendant, and when the court asked whether he agreed with the decision not to call Mr. Ward defendant responded, "Yes, sir." Defendant argues that the trial court should have admitted Ward's affidavit, but he "may not now attack a procedure to which [he] agreed ***." *People v. Harvey*, 211 Ill. 2d 368, 385 (2004).

¶ 39 Since evidence at the hearing supports the trial court's finding that ASA Murphy tendered the DVD and lab reports to defense counsel prior to trial, no *Brady* violation occurred.

¶ 40 II. Jury Instruction - Surveillance Videotape

¶ 41 Defendant next argues that the loss of the Baymont Inn surveillance videotape violated his right to due process and required the trial court to tender IPI 5.01 (spoliation instruction) to

the jury as a remedy, which it did not do. IPI 5.01 provides that "[i]f a party to this case has failed to offer evidence within his power to produce, you may infer that the evidence would be adverse to that party" if certain elements listed therein are present. Here, the trial court determined that IPI No. 5.01, a civil instruction dealing with a party's failure to produce evidence, was not appropriate. The trial court's denial of a jury instruction is reviewed for abuse of discretion. *People v. Mohr*, 228 Ill. 2d 53, 66 (2008).[1]

¶ 42 Before reaching the question of whether the trial court erred in refusing to give IPI 5.01 as a remedy for a due process violation, we must determine whether a due process violation occurred in the first place. Parties have "a duty to take reasonable measures to preserve the integrity of relevant and material evidence." *Shimanovsky v. General Motors Corp.*, 181 Ill. 2d 112, 121 (1998). Thus, courts have considered it "unreasonable noncompliance [with discovery rules], and thus sanctionable, for a party to fail to produce relevant evidence because it was destroyed prior to the filing of a lawsuit and, thus, before any protective order can be entered by the court." *Id.* at 121. The due process clause, however, is only implicated where the failure to preserve potentially useful evidence was done in bad faith on the part of the State. *Arizona v. Youngblood*, 109 S.Ct. 333, 337 (1988).

¶ 43 The bad faith requirement limits the State's obligation to preserve evidence to "those cases in which the police themselves by their conduct indicate that the evidence could form a basis for exonerating the defendant." *Id.* Defendant argues that bad faith may be inferred where Calumet City police recognized the videotape's importance by confiscating it within hours of being informed that defendant was a suspect, and the videotape was not disposed of per the

[1] The State questions whether IPI 5.01 applies to it in this situation. To address defendant's argument, we presume that the instruction would apply here to the State. However, we need not reach the merits of that issue in this case.

police department's normal practice. The police here, however, did not conceal its possession of the videotape from defendant, nor is there evidence that they intentionally destroyed the videotape as opposed to not being able to locate the videotape. Negligent conduct cannot be the basis of a bad faith allegation in a *Youngblood* analysis. *Id*. at 337-38. Although this court does not condone the misplacement of evidence, the trial court's decision not to give IPI 5.01, based on its finding that the police department's conduct demonstrated negligence rather than bad faith, was not an abuse of discretion.

¶ 44 Defendant must also show that the videotape was potentially useful in order to establish a violation of his due process rights. Under Illinois law, lost evidence is potentially useful if it "was important relative to the evidence presented against the defendant at trial." *People v. Hobley*, 182 Ill. 2d 404, 440-41 (1998). Defendant cites to *People v. Walker*, 257 Ill. App. 3d 332 (1993), as support for his argument that the videotape was potentially useful evidence.

¶ 45 In *Walker*, Mary Groff testified that she was at a restaurant awaiting her pizza order when defendant entered. He entered and left the restaurant a number of times, and after he entered for the last time he turned to Groff and demanded her wallet and cash. *Id*. at 333. Groff struggled with defendant and he pushed her into a window, took her money and wallet, and fled the restaurant. Groff testified that defendant was wearing a brown leather cap, a light colored jacket, and blue jeans. *Id*. Groff called police and about 10 minutes after they arrived, defendant was brought back to the restaurant. The officer who stopped defendant testified that when defendant was apprehended, he was not wearing a hat or a jacket. *Id* at 334. As he exited the police vehicle, Groff noticed that defendant was wearing different clothes and had mud on him, but " 'his face looked the same.' " *Id*. at 333. Groff identified defendant again at the police station when he was wearing a jacket and hat. *Id*.

¶ 46 After Groff's testimony, the State informed the court that certain items inventoried by police were destroyed approximately six weeks after defendant's arrest and eight months prior to trial. These items included a plastic bag, a jacket, a hat, a knife, a grey suit and a pair of brown leather gloves. *Id*. at 333-34. After the evidence was presented, the jury informed the court that it was unable to reach a verdict. The trial court declared a mistrial, and subsequently granted defendant's motion to dismiss the indictment because the destruction of material evidence violated his due process rights. *Id*. at 335.

¶ 47 This court affirmed the dismissal, finding that police destroyed the evidence against the department’s normal procedure of destroying property when it is no longer needed as evidence. *Id*. at 335. We found that a "reasonably prudent police officer acting in good faith would not assume that material evidence would no longer be needed six weeks after arrest" since "no case comes to trial within six weeks of the arrest." *Id*. at 335-36. We further found that the destroyed evidence "played a central role in defendant's defense of misidentification," could not be obtained through other means, and "could have played a large part in the jury's inability to reach a verdict." *Id*. at 336.

¶ 48 *Walker* does not support defendant here. In *Walker*, bad faith on the part of the police was inferred because a "reasonably prudent police officer acting in good faith would not assume that material evidence would no longer be needed six weeks after arrest ***." *Id*. at 335-36. Unlike the case in *Walker*, there is no evidence that the police intentionally destroyed the videotape shortly after it was recovered. Also, the destroyed evidence in *Walker* consisted of clothing, the exact items in controversy at trial. The same type of evidence could not be obtained by other means. Here, the videotape at issue contained evidence that was also presented at trial through the testimony of Pierce. The videotape purportedly would show when the defendant left work on

October 22nd, and perhaps when Pierce received a call from him after he arrived at home. However, Pierce testified at trial that defendant left the Baymont Inn at 4:30 a.m. and called her at 5:05 a.m. Defendant does not argue that Pierce's testimony was inaccurate. To the extent defendant seeks the videotape to show this timeline, that evidence is merely cumulative to evidence already established at trial.

¶ 49 Significantly, unlike the destroyed evidence in *Walker*, the lost videotape would not have been determinative of the outcome of this case. Here, the State did not dispute Pierce's timeline which the videotape would allegedly corroborate. In closing argument, the State agreed with Pierce's testimony that defendant left work at 4:30 a.m., and argued that by 5:05 a.m. he was on his way home after the attack when he called Pierce to check on her. Pierce acknowledged that she did not know from where defendant was calling. No evidence was presented that it would be impossible for him to leave work at 4:30 a.m., attack Isidra, and then make a call to Pierce around 5:05 a.m. In fact, the jury found defendant guilty based on this evidence.

¶ 50 Defendant further contends that the videotape was potentially useful because it would show the clothes he was wearing when he left work, and could exonerate him by showing that he was wearing the same clothes when he was arrested with no blood found on him. Even if the videotape did show what defendant contends, that information could be inferred from other evidence in the case. Officer Coffey testified that he went to defendant's apartment shortly after the attack occurred, around 5:30 a.m. The van he found there was "hot to the touch." Also, he found defendant in his bedroom sitting on the bed. He found no blood on the bed and no bloody clothes on the floor. This evidence could support defendant's position that he did not change clothes after leaving work.

¶ 51 We find that the videotape was not lost in bad faith, nor did it contain potentially useful evidence that could not be obtained by other means. Since no due process violation occurred, IPI No. 5.01 need not have been given as a remedy and therefore, the trial court did not err in failing to give the jury instruction.

¶ 52 Furthermore, whether to give IPI No. 5.01 is within the trial court's sound discretion and a new trial is warranted only where the court's denial of the tendered instruction resulted in prejudice. *Brown v. Moawad*, 211 Ill. App. 3d 516, 530 (1991). The evidence presented at trial showed that Isidra started divorce proceedings and refused defendant's plea to stop the proceedings and work things out. Defendant had replaced the window of the first floor guest bedroom before he moved out of the residence, and the attacker entered through that window. Also, the attacker knew the guest bedroom was the only empty room on the first floor; Isidra's older children slept in the other first floor bedroom. The attacker knew where Isidra slept in the basement and navigated his way through the dark to the hallway outside her bedroom where he stabbed her. Isidra consistently identified defendant as her attacker to her mother, to 911, and to the responding officers. A knit cap with holes cut out for eyes was recovered from the guest bedroom, the point of entry and exit of the offender. Samples taken from the cap contained DNA that matched with defendant. Given the overwhelming evidence against him, the trial court’s refusal to tender IPI 5.01 to the jury did not prejudice defendant.

¶ 53 Defendant also argues that IPI No. 5.01 should have been given because the State's failure to produce the videotape was a violation of Illinois Supreme Court Rule 412(f) (eff. Mar. 1, 2001) ("The State should ensure that a flow of information is maintained between the various investigative personnel and its office sufficient to place within its possession or control all material and information relevant to the accused and the offense charged"). We note, and

defendant acknowledges, that he did not raise this issue before the trial court in his motion for sanctions, nor did he raise it during the jury instruction conference or in his post-trial motion. "Generally, an unsuccessful party cannot raise a new theory of recovery for the first time on appeal." *Trapani Construction Co., Inc. v. Elliot Group, Inc.*, 2016 IL App (1st) 143734, ¶ 55. An issue not raised before the trial court has not been properly preserved and results in forfeiture of that issue on appeal. *Id.*

¶ 54 III. Closing Argument

¶ 55 Defendant argues that this court should reverse his conviction and remand the cause for a new trial because the prosecutor improperly called him "garbage" in rebuttal closing argument. Defendant acknowledges that he failed to preserve this issue for appeal since he did not object to the comment at trial. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (failure to object at trial and include the issue in a post-trial motion waives review of that issue on appeal). Defendant requests that we review the issue as plain error. However, before engaging in plain error analysis we first determine whether the prosecutor's remarks constitute error at all. *People v. Gonzalez*, 388 Ill. App. 3d 566, 587 (2008).

¶ 56 Prosecutors are given wide latitude in making closing arguments. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). The prosecutor may attack defendant's theory of defense (*People v. Doyle*, 328 Ill. App. 3d 1, 12 (2002)), and in rebuttal may respond to comments made by defense counsel in closing argument which invite a response (*People v. Kliner*, 185 Ill. 2d 81, 154 (1998)). Furthermore, we consider the challenged remarks in context of the entire record, particularly the closing arguments of both parties. *People v. Williams*, 313 Ill. App. 3d 849, 863 (2000). Reversal based on improper argument is warranted only where the improper remarks substantially prejudiced defendant; in other words, where the remarks constituted a material

factor in defendant's conviction. *Wheeler*, 226 Ill. 2d at 123. The standard of review for closing arguments is unclear, where our supreme court in *Wheeler* applied the *de novo* standard (*Id*. at 121) but in *People v Blue*, 189 Ill. 2d 99, 128 (2000), applied the abuse of discretion standard. See *People v. Thompson*, 2013 IL App (1st) 113105, ¶¶ 76-77 (acknowledging conflict in the standard of review). Our conclusion, however, is the same under either standard.

¶ 57 During closing argument, defense counsel challenged the State's DNA evidence in detail, first pointing out that proper analysis of a DNA specimen requires a comparison with not only "the person you think done it, but ***with other people who could have been contributors." In this case, counsel argued, no other person living in Isidra's house was tested to see if the DNA sample from the recovered knit cap matched them. Counsel reminded jurors that defendant's young son lived in the house and "might have been playing with the cap, wearing the cap, somehow or another got his DNA on it or his cells on it." Counsel referred to the results of the DNA analysis and informed the jury that material was present in the sample tested "that could not be explained on the basis of any of [defendant's] cellular components." He argued that the DNA components "might well have matched up with another person," especially "a directly related person living in the house, and there was no exclusion of that person." Counsel then made the following remark:

> "So, the DNA looks fancy. It sounds high powered, and it's an important tool in Forensic science, but it has to be done correctly. It's kind of like what we say about computers, garbage in, garbage out. If you don't put the right information in, you're not a [*sic*] going to get the right information out. And that's exactly what's happened here."

¶ 58 In rebuttal, the prosecutor argued that Isidra's identification of defendant as her attacker was unwavering, as shown by her "confident and credible" testimony on the witness stand. The

prosecutor detailed Isidra's conversation with 911 when she told the dispatcher defendant was her attacker. She stated that Isidra "told 911. She told her mother. She told Officer Randall right away when he was on the scene. And she told you. And how do you know she told you the truth? The DNA on this mask that the defendant left. That's how you know." The prosecutor then made the following challenged remark: "Counsel says, garbage in, garbage out. The only garbage at 715 Sibley was the defendant, and then he got himself, his own garbage, out."

¶ 59 This comment was clearly a response to defense counsel's attempt to discredit the State's DNA results when the DNA analysis did not include samples from other related individuals who resided in the house. Defense counsel argued that DNA samples from these other persons should have been included along with defendant's sample in the analysis, because "if you don't put the right information in, you're not a [*sic*] going to get the right information out." As defense counsel described it, "garbage in, garbage out." In rebuttal, the prosecutor disputed defense counsel's characterization that the analysis was flawed, and reiterated that defendant's DNA matched the DNA recovered from the knit cap. She then made the challenged remarks. The prosecutor was not referring to defendant as garbage, but rather to the tested DNA sample recovered from the knit cap which, she argued, came only from defendant.

¶ 60 Moreover, defendant's conviction would not be overturned unless the remarks were a material factor in his conviction. *Wheeler*, 226 Ill. 2d at 123. The prosecutor made the single comment within the context of a rebuttal that covered 13 pages of transcript in the record, and was made after lengthy closing arguments by both parties. Given the substantial evidence against defendant, such isolated comments, even if improper, do not warrant reversal. See *People v. Runge*, 234 Ill. 2d 68, 142 (2009) (whether the challenged comments were "brief and isolated in

the context of lengthy closing arguments" is a significant factor "in assessing the impact of such remarks on a jury verdict"). Since we find no error, there is no plain error.

¶ 61 IV. Ineffective Assistance of Counsel

¶ 62 Defendant argues that if this court finds defense counsel Ward received the materials on the knife prior to trial, counsel was ineffective for failing to investigate the knife or the circumstances of its discovery. To prevail on an ineffective assistance of counsel claim, defendant must show that counsel's performance was objectively unreasonable and there is a reasonable probability that but for counsel's misconduct, the result of the proceedings would have been different. *People v. Domagala*, 2013 IL 113688, ¶ 36. The failure to satisfy either prong precludes a finding of ineffectiveness. *People v. Veach*, 2017 IL 120649, ¶ 30.

¶ 63 Although defendant claims his counsel was ineffective for failing to investigate the recovered knife, the relevancy of the knife is far from certain. It was found more than three years after the attack. No blood was detected on the knife and no usable fingerprints could be compared. As ASA Murphy testified, "there was no physical evidence on the knife linking it to this crime" so she "didn't think it had anything to do with this crime." Furthermore, as discussed above, the evidence presented at trial against defendant was overwhelming. Under these circumstances, the knife was not evidence of such magnitude that it would have changed the outcome of defendant's trial. As such, he has not satisfied the prejudice prong and cannot prevail on his ineffective assistance of counsel claim. *People v. Smith*, 341 Ill. App. 3d 530, 544 (2003).

¶ 64 V. Cumulative Error

¶ 65 Defendant argues that the mistakes made by the police in their investigation, and the State's handling of the knife, undermine the jury's verdict. He cites *Jordan v. State*, 343 S.W. 3d 84 (2011), a Tennessee case, in which the victim was stabbed and her neck was slashed. The

court determined that the police's failure to investigate a knife, found less than a mile from the location of the victim's body, undermined its confidence in the outcome of the trial. *Id*. at 100. The court reasoned that the case was "a close one" where "[t]here is no direct evidence of [defendant's] guilt." *Id*. at 99. Testimony presented at trial also indicated that other men had been seen with the victim prior to the attack. *Id*. Supporting evidence was presented on both sides and the jury "chose to accredit the testimony of the state's witnesses and disregard the conflicting proof." *Id*. at 100. The court concluded that it " 'cannot be reasonably confident that every single member of the jury,' after hearing evidence impugning the police investigation, would have found the [defendant] guilty because the margin of sufficiency was so slim that *any* favorable evidence would be material." *Id*. quoting *Johnson v. State*, 38 S.W. 3d 52, 59 (2001).

¶ 66 *Jordan* is distinguishable. Here, the police did not fail to investigate the knife nor did the State conceal the discovery of the knife from defense counsel. The knife was also tested and the results did not connect the knife to the attack on Isidra. Importantly, unlike the case in *Jordan*, there was direct evidence of defendant's guilt presented at trial in the form of DNA evidence and Isidra's consistent and positive identification of defendant as her attacker. The testimony of a single witness, if positive and credible, is sufficient to support a conviction even if contradicted by the defendant. *Siguenza-Brito*, 235 Ill. 2d at 228.

¶ 67 VI. Conclusion

¶ 68 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 69 Affirmed.