

2019 IL App (1st) 151419-U

No. 1-15-1419

Order filed May 31, 2019

Fifth Division

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 13 CR 6376
)	
GABRIEL GUARDIOLA,)	Honorable
)	Joseph M. Claps,
Defendant-Appellant.)	Judge, presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Presiding Justice Rochford and Justice Hoffman concurred in the judgment.

ORDER

- ¶ 1 *Held:* (1) The trial court did not err by either admitting evidence of defendant's sexual activity immediately following the shooting or ruling that the State would be allowed to question a character witness about her knowledge of the charges against defendant.
(2) The prosecutor did not engage in misconduct by attacking defendant's credibility and his theory of defense.
(3) Defendant's trial counsel did not render ineffective assistance by not presenting expert testimony regarding ballistics, failing to use evidence of defendant's intoxication to support an involuntary manslaughter defense theory, or conceding defendant's guilt.

(4) Defendant's right to confrontation was not violated by a medical expert's testimony regarding the autopsy report that was prepared by a non-testifying witness.

¶ 2 A jury found defendant Gabriel Guardiola guilty of the first degree murder of Ricardo Rivera (the victim). The trial court sentenced defendant to a prison term of 30 years plus a 25-year mandatory enhancement for personally discharging a firearm that proximately caused the victim's death.

¶ 3 On appeal, defendant argues that (1) the trial court committed reversible error by admitting evidence of defendant's "extra-marital affairs" and ruling that the State would be allowed to question defendant's wife, the defense's "most important character witness," about her knowledge of the charges against defendant; (2) the prosecutor engaged in misconduct during closing argument by accusing defendant of lying on the stand and defense counsel of suborning perjury; (3) trial counsel provided ineffective assistance by not calling a ballistics expert to testify about the potential inaccuracy of defendant's gun, by not using defendant's intoxicated condition to argue, in support of the involuntary manslaughter defense theory, that his conduct was reckless, and by giving a convoluted closing argument that conceded defendant's guilt of first degree murder; and (4) defendant's sixth amendment right to confrontation was violated when an expert witness testified to an autopsy report generated by a non-testifying witness.

¶ 4 For the reasons that follow, we affirm the judgment of the trial court.¹

¹ In adherence with the requirements of Illinois Supreme Court Rule 352(a) (eff. July 1, 2018), this appeal has been resolved without oral argument upon the entry of a separate written order.

¶ 5

I. BACKGROUND

¶ 6 Based upon witness testimony, forensic evidence, cell phone and voicemail evidence, and a dark and blurry recording from a security camera at the scene of the offense, the following occurred. On February 24, 2013, defendant and the victim, who were friends, were drinking alcohol and smoking marijuana at a strip club they occasionally patronized. The club was located on West Madison Street near Cicero Avenue in Chicago. Sometime between 2 and 2:30 a.m., a stripper at the club met defendant. She did a lap dance for him and gave him her telephone number. She testified at the trial that she did not see the victim bite anyone, never saw defendant and the victim argue, and did not see them leave the club. She left the club at 3:30 a.m.

¶ 7 At about 4:20 a.m., the victim and defendant were on Cicero Avenue a few blocks away from the club. Defendant was in the driver's seat of his Dodge Charger and the victim was outside the car. The victim telephoned their mutual friend, Evangelisto Candelario, also known as Halo, but Halo was in bed and did not answer. Then defendant telephoned Halo at 4:21 and 4:23 a.m. Halo assumed that the victim and defendant were out partying and did not answer because Halo's girlfriend was asleep next to him.

¶ 8 Defendant left Halo a voicemail message, and the recording captured defendant first asking the victim if he was talking to Halo. Defendant then addressed Halo and complained that the victim would not get back in the car. Defendant said that if the victim did not get in defendant's car, the victim would haunt defendant for the rest of his life because he was going to shoot the victim. Defendant asked Halo to call him back. Halo listened to the voicemail but did not think much of it because defendant and the victim were friends.

¶ 9 Meanwhile, the victim walked into a parking lot next to a liquor store while defendant slowly drove his car alongside the victim. The victim walked up to the brick wall of the store, apparently to urinate. Defendant grabbed his loaded gun, a .22 caliber semi-automatic handgun, and exited his car. He cocked the trigger and held his gun in his right hand. While the victim was facing the wall, defendant approached him from behind and pushed him. After some back and forth movement between them, defendant extended his right arm while the victim was still standing by the wall. Defendant fired his gun and the victim fell to the ground. Defendant moved toward his car but then ran back to the victim. Then defendant went back to his car and returned again to the victim, this time apparently touching the victim or going through his clothing. Defendant then returned to his car and drove away without calling 911.

¶ 10 Defendant telephoned his girlfriend and they met up and went to Montrose Beach. They engaged in sexual activity and then went to a fast food restaurant to eat. After defendant left his girlfriend, he went to his wife's house. Even though defendant and his wife were separated sometimes, he occasionally stayed in her basement. He parked his Dodge Charger in the garage, went to his basement bedroom, and put his gun in a drawer. Then he contacted the stripper he met at the club and drove his Mitsubishi to a hotel to meet her.

¶ 11 About 7:30 a.m., the police were at the scene of the shooting. The deceased victim was lying in the snow. His identification was in his wallet and a knife was in his waistband. He had an obvious eye injury and his penis was exposed. The black knit hat on his head had a hole that corresponded to the gunshot entry wound on the right side of the back of his head, behind his right ear. The trajectory was right to left, back to front, and on a relatively even plane, not significantly up or down. The bullet was lodged in the left parietal lobe of the brain. The victim

suffered at least a loose contact range wound, if not a hard contact range wound, meaning that the muzzle of the gun was pressed against the victim's skin either loosely or tightly. Minor scrapes and abrasions on the victim's face were consistent with being pushed into a brick wall. The victim's swollen eye was consistent with the gunshot or blunt force trauma.

¶ 12 A live .22 caliber round was found on the street. A security camera attached to the building recorded distant, blurry and dark images of the scene and defendant and the victim. The black and white recording did not provide close-up images and the low quality of the recording did not capture images of defendant, his car, or the victim that would have made them identifiable.

¶ 13 That same morning, the police went to the victim's home, where he lived with his parents, and informed them that their son had been murdered. The victim's family informed his close friend Jose Figueroa about the murder, and Figueroa went to the victim's home and spoke to the police.

¶ 14 Meanwhile, defendant, who was at the hotel with the stripper, received a phone call from Halo, who was on his way to church. Halo, referring to defendant's voicemail message, asked what happened and if everything was okay. Defendant responded that everything was "cool," and the victim just had an argument with "a couple of black guys." Defendant said that he was at a hotel and ended the conversation quickly. Defendant told the stripper that he thought the black music producer he met at the strip club was responsible for the victim's death. When the stripper asked defendant if he needed to leave, he told her that he would stay. Defendant stayed with the stripper at the hotel for about 30 minutes. They engaged in sexual activity and then went their separate ways.

¶ 15 At about noon, Halo received a phone call from defendant, who said, “They got him. They shot him.” Halo asked what defendant meant, but defendant hung up to speak to Figueroa on the other line. Halo called Figueroa, learned that the victim was dead, and started driving to the victim’s house.

¶ 16 The police and Figueroa were at the victim’s house when defendant arrived at about 12:45 p.m., driving his Mitsubishi with the music blasting. The police wanted to talk to defendant because he was one of the last known people who saw the victim alive. Defendant exited his car and dramatically wailed with his arms in the air that he knew the two black men who killed the victim. Defendant ultimately agreed to talk to the police even though he did not trust them. The police did not search him because they were told that he was the victim’s friend.

¶ 17 Defendant told the officers that the victim had contacted him about 2 a.m. to go to a strip club. Defendant drove to pick up the victim and then drove to the strip club, where they drank, had lap dances, and spoke to two black music producers. Defendant claimed that security kicked the victim out of the club for biting a dancer’s breast. Defendant also claimed that he argued with the victim about getting kicked out of the club and consequently left the victim outside the club. Defendant mentioned that he called Halo during defendant’s argument with the victim. Defendant told the officers about going to the beach with his girlfriend, going to his wife’s house afterwards, and then meeting the stripper at the hotel. Defendant also claimed that, while he was at the hotel, Halo called and told him that the victim had been shot and killed. Then defendant rode in the officers’ vehicle and showed them the various locations he had mentioned.

¶ 18 Meanwhile, Halo arrived at the victim’s home, took Figueroa aside and played defendant’s voicemail message for Figueroa. When the officers returned to the victim’s house

with defendant, Halo approached the officers' vehicle and asked to speak to them. Halo stopped defendant from exiting the vehicle because Halo wanted defendant to "hear this." Halo entered the vehicle, asked the officers to lock the doors and close the windows, and played defendant's voicemail message. After the officers heard it, they jumped out of their vehicle, realizing that defendant was the offender and they had not searched him. Halo then attacked defendant. The officers stopped the fight, arrested defendant, and took him to the police station.

¶ 19 At the station, defendant agreed to speak to the officers and told them essentially the same version of events that he had told them earlier at the victim's house. Defendant added that he called the victim a few times after leaving him. Telephone records, however, revealed that defendant did not call the victim after 2 a.m. The police retrieved defendant's gun from his wife's house.

¶ 20 The next day, the police went back to the scene of the shooting. The snow had melted a little, and they recovered a .22 caliber shell casing near where the victim's body had been. Testing revealed that the casing had been fired from defendant's gun. The fired bullet recovered from the victim's brain was too damaged to identify whether it had been fired from defendant's gun. Also, it could not be determined whether the live round found in the street came from defendant's gun. Biological material was recovered from inside the barrel of defendant's gun, and testing revealed that the material matched the victim's DNA profile. Gunshot residue was found on the right cuff of the sweater defendant wore during the shooting.

¶ 21 The defense presented the testimony of defendant's cousin, brother, deceased friend's wife, and co-worker regarding their consistent opinions that defendant was a peaceful person.

¶ 22 Defendant testified consistently with some of his prior statements to the police. However, he stated that, at the time of the offense, he was driving the victim home when they argued about getting kicked out of the club due to the victim's behavior. When the victim pointed his finger in defendant's face, defendant slapped the victim's hand away. They also argued over money, and the victim refused to pay defendant and threatened to kill him. Defendant pulled his gun from the car's driver's-side door pocket and placed the gun on the armrest, saying, "You want to kill me? I have my gun. There it is." The victim grabbed the gun and played with it briefly before returning it to the armrest. Defendant told the victim to get out of the car.

¶ 23 According to defendant, they continued to argue through the car window as the victim walked toward the wall of the liquor store. When the victim started calling someone on his phone, defendant assumed that he was contacting Halo, so defendant also phoned Halo, seeking help to persuade the victim to return to the car. Defendant asserted that his voicemail message to Halo about shooting the victim was not serious; defendant was simply trying to get Halo's attention.

¶ 24 While the victim urinated against the wall, defendant parked his car, retrieved his gun from the door pocket, and exited the car. He cocked his gun and walked up to the victim. They were still engaged in a heated argument. Defendant pushed the victim's arm to turn him around to face defendant. They argued and pushed each other. The victim was standing sideways and refused to return to the car, so defendant tried to scare him by pointing the gun at the brick wall and firing one gunshot. Defendant claimed that he was "looking away" when he fired the gun and did not intend to shoot the victim.

¶ 25 Defendant testified that he was walking toward his car, not realizing that his bullet hit the victim, and then heard the thump of the victim's body falling to the ground. Defendant returned to the victim and assumed that he was dead. Defendant got back in his car, put his gun on the seat, and sat there, not believing what had just happened. Then defendant walked back to the victim, touched him, and determined that he was not breathing. Defendant returned to his car and drove away without calling 911. Defendant claimed that he lied about the shooting to everyone because he "panicked" and was afraid of the police and Halo.

¶ 26 The jury found defendant guilty of first degree murder and found that he discharged a firearm during the commission of the offense. The trial court sentenced him to 55 years' imprisonment, which included the mandatory 25-year enhancement.

¶ 27

II. ANALYSIS

¶ 28 On appeal, defendant argues that (1) the trial court committed reversible error by admitting evidence of defendant's "extra-marital affairs" and ruling that the State would be allowed to question defendant's wife, the defense's "most important character witness," about her knowledge of the charges against defendant; (2) the State committed reversible error by accusing defendant of lying on the stand and defense counsel of suborning perjury; (3) trial counsel provided ineffective assistance by not calling a ballistics expert to testify about the potential inaccuracy of defendant's gun, by not using defendant's intoxicated condition to argue that his conduct showed recklessness rather than the mental state sufficient to prove he knew his conduct created a strong probability of causing the victim's murder, and by giving a convoluted closing argument that conceded defendant's guilt of first degree murder; and (4) defendant's

sixth amendment right to confrontation was violated when an expert witness testified to an autopsy report generated by a non-testifying witness.

¶ 29 A. Admission of Evidence

¶ 30 Defendant argues that the trial court committed reversible error by (1) admitting irrelevant and prejudicial evidence of his “extra-marital affairs,” which served no purpose other than to sully his character; and (2) effectively precluding the defense from calling defendant’s wife as an important character witness because the court erroneously ruled that the State would be allowed to ask her about her knowledge of the charges against defendant.

¶ 31 Reviewing courts will not disturb a trial court’s evidentiary rulings absent an abuse of discretion. *People v. Harvey*, 211 Ill. 2d 368, 392 (2004). “A trial court abuses its discretion where its decision is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the trial court’s view.” *People v. Craigen*, 2013 IL App (2d) 111300, ¶ 45.

¶ 32 All relevant evidence is admissible unless otherwise provided by law. *People v. Cruz*, 162 Ill. 2d 314, 348 (1994). “Relevancy is established where a fact offered tends to prove a fact in controversy or renders a matter in issue more or less probable.” *People v. Monroe*, 66 Ill. 2d 317, 321 (1977). According to Illinois Rule of Evidence 401 (eff. Jan. 1, 2011), “ ‘[r]elevant evidence’ means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.” Evidence of other crimes or bad conduct is not admissible for the purpose of showing the defendant’s disposition or propensity to commit crime. *People v. Lindgren*, 79 Ill. 2d 129, 137 (1980). However, according to Illinois Rule of Evidence 404 (eff. Jan. 1, 2011), “[s]uch evidence may also be admissible for other purposes, such as proof of motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Additionally, such evidence may also be admissible to show a defendant’s state of mind, absence of an innocent mind frame or the presence of criminal intent, and placement of defendant in proximity to the time and place of the crime. *People v. Millighan*, 265 Ill. App. 3d 967, 972-73 (1994) (citing *People v. Kimbrough*, 138 Ill. App. 3d 481, 484-85 (1985)).

¶ 33 If the evidence is admissible for one or more proper purposes, such evidence may still be excluded. The trial court must weigh its probative value against any unfairly prejudicial effect and may exclude the evidence if its unfairly prejudicial effect *substantially* outweighs its probative value. (Emphasis added.) *People v. Illgen*, 145 Ill. 2d 353, 365 (1991). “However, if the evidence of the other offenses and the evidence of the crime charged are inextricably intertwined, the rule relating to other crimes is not implicated and ordinary relevancy principles apply.” *People v. Rutledge*, 409 Ill. App. 3d 22, 25 (2011). Evidence of crimes or other acts may also be admitted if it is part of the “continuing narrative” of the charged crime; such crimes do not constitute separate, distinct, and disconnected crimes. *People v. Pikes*, 2013 IL 115171 ¶ 20.

¶ 34 First, defendant argues that trial court committed reversible error by allowing the State to cross-examine him about having sex with two women shortly after he shot and killed his good friend because that evidence was irrelevant and prejudicial and served no purpose other than to sully defendant’s character. He also argues that this court error was exacerbated because (1) the State’s cross-examination of defendant concerning the sex evidence exceeded the limits set by the trial court; (2) the trial court failed to give a limiting instruction at the close of the case; (3) the State gave the sex evidence special attention during closing argument; and (4) defense counsel failed to sufficiently challenge the admissibility of the sex evidence as irrelevant and

unduly prejudicial. Defendant asserts that whatever little probative value the sex evidence may have had to the State's case was outweighed by its prejudicial impact. Defendant contends that the entire defense of involuntary manslaughter hinged on defendant's credibility and the State used the sex evidence to dirty him up and make it impossible for the jury to sympathize with him.

¶ 35 The record refutes defendant's assertion that his trial counsel failed to sufficiently challenge the admissibility of the sex evidence. According to the record, the defense moved *in limine* to exclude, as irrelevant and extremely prejudicial, evidence that he had sex with his girlfriend and the stripper. The State responded that the evidence of defendant's sexual conduct immediately after killing his friend showed defendant's demeanor, addressed whether his actions after the shooting were consistent with the bereavement for a good friend and defendant's claims of self-defense and mistake, and showed his course of conduct where his actions were interwoven with the narrative he gave the police. The trial court deferred ruling on the matter until the parties presented any evidence that raised the issue.

¶ 36 The State did not elicit in its case-in-chief any testimony about defendant having sex with the women. Instead, the State elicited testimony from the police that defendant said he "met up with" and "spent time" with the women as an alibi for the crime; and testimony from the stripper that she met defendant at a hotel after the shooting. Thereafter, defendant testified on direct-examination that he was only trying to scare the victim by firing a gunshot at the brick wall and subsequently lied about shooting the victim because defendant was afraid of the police and Halo and was "panicking."

¶ 37 Before the State cross-examined defendant, the trial court revisited the issue of the admissibility of the evidence that defendant had sex with the two women shortly after the shooting. After hearing argument from counsel, the court ruled that the sex evidence was relevant to show whether defendant actually was in a state of panic after the shooting; however, the court limited the State to asking only one question for each woman.

¶ 38 On appeal, defendant erroneously claims that the State violated the court's limitation on the use of the sex evidence by posing more than 10 questions to defendant about having sex with the women. The record establishes that the State asked defendant multiple questions about how his alleged state of panic after the shooting did not hinder him from calling his girlfriend and going to the beach with her, or from hiding his gun at his wife's house, or from calling the stripper and meeting her at a hotel. However, those questions about defendant's conduct after the shooting did not reference the sex evidence. The State, in compliance with the court's ruling, did not ask defendant more than two questions about having sex with the women. Also, contrary to defendant's assertion on appeal, the trial court did not direct the State away from questioning defendant about the sex evidence; rather, the court told the State to "[m]ove away from that, please," when defense counsel objected, on the grounds of "asked and answered," to the State's question about defendant calling his girlfriend despite his alleged panicked state. After defendant's testimony, the trial court gave the jury a limiting instruction, explaining that defendant's "testimony about the activity with these two young ladies" was admissible only for the jury to assess his state of mind at the time of the event" and could never be used as evidence of his bad acts. No further evidence was introduced after defendant's testimony.

¶ 39 Regarding closing argument, defendant’s claim on appeal that the State “sarcastically referenc[ed] the affairs numerous times,” is not supported by the record. Rather, the State, in the context of refuting as “fantasy” defendant’s assertion that he panicked and was afraid after the shooting, listed the facts about his conduct after the shooting. Regarding the sex evidence, the prosecutor mentioned only once for each woman that defendant had sex with them after the shooting. Furthermore, after closing argument, the trial court instructed the jury that “[a]ny evidence that was received for a limited purpose should not be considered by you for any other purpose.”

¶ 40 We conclude that that trial court did not abuse its discretion by admitting, with limitations, the evidence that defendant had sex with the two women after the shooting. The trial court exercised great caution in allowing this evidence to be presented to the jury, and the record supports the trial court’s decision that the limited use of the sex evidence was more probative than prejudicial. The sex evidence was relevant to show that the shooting was not a mistake and defendant was not in a state of panic or fear after the shooting. The sex evidence was also intertwined with the evidence of the crime because defendant initially told the police about spending time with the women as an alibi for the crime. See *People v. Durk*, 215 Ill. App. 3d 186, (1991) (where the defendant testified that he was disoriented after he shot the victim, the admission of the defendant’s cross-examination testimony that after the crime he went home and snorted crystal methane with some visitors was not error because the evidence of his activities after the crime was “relevant to a discussion of the event itself”); *People v. Almo*, 123 Ill. App. 3d 406, 411-12 (1984) (evidence of the defendant’s actions immediately after the shooting was relevant to the jury’s determination of the credibility his account of the shooting).

¶ 41 Next, defendant argues that the trial court effectively precluded the defense from calling defendant's wife as a very important character witness because the court erroneously ruled that it would allow the State to question her about her knowledge of the charges against defendant. To support this proposition, defendant relies on *People v. Greeley*, 14 Ill. 2d 428, 432 (1958), and its progeny, which held that it was improper to permit a character witness to be cross-examined about his own knowledge of the defendant's guilt or particular acts of misconduct because character may be proved only by evidence of the defendant's general reputation in the community for characteristics relevant to the crime for which he was charged. Defendant asserts that such questioning on cross-examination would have been beyond the scope of the wife's anticipated direct-examination testimony that defendant had a peaceful character. He also contends that he suffered prejudice from this error because trial counsel's opening statement told the jury that defendant's wife would be called as a witness, so the jury expected to hear her testimony.

¶ 42 Defendant acknowledges that this issue was not preserved for review by both making a timely objection and raising the alleged error in a written posttrial motion. Defendant states, however, that the rule concerning forfeiture is applied less rigidly when the error results from the trial judge's conduct. Defendant urges this court to review this issue for plain error because the evidence was closely balanced concerning whether defendant's conduct was either reckless or knowing and intentional, and the error was so serious that it undermines confidence in the outcome of this case. Defendant also argues that trial counsel rendered ineffective assistance by failing to preserve this error for review.

¶ 43 In general, a defendant preserves an issue for review by timely objecting to it and including it in a posttrial motion. *People v. Denson*, 2014 IL 116231, ¶ 11. However, we may review claims of error under the plain error rule (Ill. S. Ct. R. 615(a)), which is a narrow and limited exception to forfeiture (*People v. Hillier*, 237 Ill. 2d 539, 545 (2010)). To obtain relief under this rule, a defendant must show that a clear or obvious error occurred. *Id.* The defendant bears the burden of persuading the court that either (1) the evidence at the hearing was so closely balanced (regardless of the seriousness of the error) as to severely threaten to tip the scales of justice against the defendant, or (2) the error was so serious (regardless of the closeness of the evidence) as to deny the defendant a fair trial and challenge the integrity of the judicial process. *People v. Herron*, 215 Ill. 2d 167, 187 (2005). In order to determine whether the plain error doctrine should be applied, we must first determine whether any error occurred. *Id.*

¶ 44 Typically, cross-examination is limited in scope to the subject matter of direct examination. *People v. Enis*, 139 Ill. 2d 264, 295 (1990). However, “the latitude permitted on cross-examination is left largely to the discretion of the trial judge and he will not be reversed absent an abuse of discretion which results in manifest prejudice to the defendant.” *Id.* According to Illinois Rule of Evidence 405 (eff. Jan. 1, 2011), proof of a person’s character or trait of character may be made by either reputation testimony or opinion testimony.

¶ 45 We conclude that no error occurred when the trial court ruled that it would allow defendant’s wife to be questioned regarding her knowledge of the charges against defendant. The reasoning in *Greeley* and its progeny no longer applies because “Rule 405(a) abrogated the prior rule prohibiting defendants from introducing character evidence through opinion testimony and expressly permitted the practice.” *People v. Garner*, 2016 IL App (1st) 141583, ¶ 30. If

defendant's wife had testified to defendant's character for peacefulness, it would have been proper to allow the State to rebut that testimony by asking her whether her knowledge of the crime would change her opinion about defendant's peacefulness. The trial court did not abuse its discretion by ruling that it would allow such questioning. Because the trial court's ruling was not error, defendant's claim of ineffective assistance of counsel on this issue lacks merit.

¶ 46 B. The State's Rebuttal Argument

¶ 47 Defendant argues that the prosecutor's remarks during rebuttal argument improperly suggested that defendant and defense counsel fabricated the defense. Specifically, defendant points to instances where the prosecutor characterized his testimony as a "fantasy" or "lie." Defendant also asserts that the prosecutor "expressed disdain for the defense." Defendant concedes that he has forfeited review of these claims by failing to both timely object and include these issues in his motion for a new trial. However, he asks us to review this issue under the plain error doctrine, arguing that the evidence was so closely balanced that this misconduct severely threatened to tip the scales of justice against him and that the cumulative effect of this misconduct was so serious that he was denied a fair trial.

¶ 48 "The regulation of the substance and style of closing argument lies within the trial court's discretion; the court's determination of the propriety of the remarks will not be disturbed absent a clear abuse of discretion." *People v. Caffey*, 205 Ill. 2d 52, 128 (2001). A prosecutor is allowed wide latitude during closing arguments. *People v. Nieves*, 193 Ill. 2d 513, 532-33 (2000). A prosecutor may comment on the evidence presented at trial, as well as any fair, reasonable inferences therefrom, even if such inferences reflect negatively on the defendant. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). Remarks made during closing arguments must be

examined in the context of those made by both the defense and the prosecution, and must always be based upon the evidence presented or reasonable inferences drawn therefrom. *People v. Coleman*, 201 Ill. App. 3d 803, 807 (1990).

¶ 49 The court reviews *de novo* the legal issue of whether a prosecutor’s misconduct, like improper statements at closing argument, was so egregious that it warrants a new trial. *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007). The reviewing court asks whether the misconduct “engender[ed] substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them.” *Id.* at 123. “Misconduct in closing argument is substantial and warrants reversal and a new trial if the improper remarks constituted a material factor in a defendant’s conviction.” *Id.*

¶ 50 This court has remarked multiple times that a conflict exists concerning whether a reviewing court should apply an abuse of discretion analysis or *de novo* review to allegations challenging a prosecutor’s remarks during closing argument. See, e.g., *People v. Deramus*, 2014 IL App (1st) 130995, ¶ 35; *People v. Hayes*, 409 Ill. App. 3d 612, 624 (2011); *People v. Raymond*, 404 Ill. App. 3d 1028, 1059-60 (2010). However, a careful review of Illinois Supreme Court precedent establishes that no such conflict exists. Specifically, our supreme court’s decisions have applied the two standards of review separately to the appropriate issue addressed on appeal.

¶ 51 In *People v. Blue*, 189 Ill. 2d 99, 128-34 (2000), the court held that the trial court abused its discretion by permitting the jury to hear the prosecutor’s arguments that the jury needed to tell the police it supported them and tell the victim’s family that he did not die in vain and would receive justice. In *People v. Hudson*, 157 Ill. 2d 401, 441-46 (1993), the court found under the

abuse of discretion standard that the prosecutor's closing argument remarks about the defendant's concocted insanity defense and his expert's lack of credibility did not exceed the scope of the latitude extended to a prosecutor. In contrast, in *Wheeler*, 226 Ill. 2d at 121-31, the court reviewed *de novo* whether a new trial was warranted based on the prosecutor's repeated and intentional misconduct during closing argument, which involved vouching for police credibility, attacking defense counsel's tactics and integrity, disparaging former defense counsel, and persistently stating that the prosecution was representing the victims. Whereas a reviewing court applies an abuse of discretion analysis to the trial court's determinations about the propriety of a prosecutor's remarks during argument (*Blue*, 189 Ill. 2d at 128; *Hudson*, 157 Ill. 2d at 441), a court reviews *de novo* the legal issue of whether a prosecutor's misconduct, like improper remarks during argument, was so egregious that it warrants a new trial (*Wheeler*, 226 Ill. 2d at 121). Our supreme court's decisions have not created any conflict about the appropriate standard of review to be applied to these two different issues.

¶ 52 Under a plain error analysis, we find that no error occurred regarding the prosecutor's challenged remarks during closing argument. According to the record, the prosecutor referred to defendant's testimony suggesting involuntary manslaughter as "weav[ing] a fantasy tale" for the jury, but the trial "was about the facts." The prosecutor argued that defendant lied to the jury. Whereas defendant denied shoving the victim into the brick wall, the security camera recording showed otherwise. The recording also contradicted defendant's claim that he returned to the victim after defendant heard the thump of the victim's body falling to the ground. Contrary to defendant's claim that he pointed his gun at the wall and fired, the medical evidence showed that the victim sustained either a loose or hard contact range wound from a gun fired directly against

the skin of his head. Moreover, defendant admitted that, before he was cornered by the evidence, he lied multiple times to his friends, acquaintances, and the police about shooting the victim and the events of that crime.

¶ 53 After reviewing these challenged remarks in context, we conclude that the prosecutor's remarks were proper comments based on the evidence. The credibility of the defendant and his theory of defense is a proper subject in closing argument as long as there is evidence that justifies the challenge. *People v. Tiller*, 94 Ill. 2d 303, 319 (1982). “[A] prosecutor can state his opinion that a defendant is lying if the statement is based on the evidence” (*id.*), and conflicts in the evidence are one basis upon which such a statement may be a fair assertion (*People v. Manley*, 222 Ill. App. 3d 896, 910 (1991)).

¶ 54 Defendant also argues that the prosecutor improperly expressed disdain for the defense and accused defense counsel of lying and suborning perjury. To support this claim, defendant cites the following three portions of the State's closing argument:

“Now, the defense is talking to you about involuntary manslaughter; and let me make one thing clear. This case has nothing to do with involuntary manslaughter. This case has everything to do with first degree murder. What else is the Defendant going to say? He took the witness stand. What else is he going to say? He has to admit he shot the guy, doesn't he? *** He can't take the stand and say, I didn't do it. So, let me see. What can I say that will make this Jury think I didn't mean to kill him? What could it be? Oh, I know, I'll tell then I wasn't firing at [him].”

* * *

“So even if you buy the incredible story the defense tried to put, the Defendant tried to tell you yesterday, it’s still first degree murder. And the Defendant argued, the Defense Counsel got up here and argued, well, you got to believe what the Defendant said, because nobody else said anything different. There were two people there, Ladies and Gentlemen, the Defendant and [the victim]. Only one of them is here to tell the tale ***.”

* * *

“Defense says, he got up there; and he testified to involuntary manslaughter. Of course he did. To save himself. That’s why he testified that way. That’s why he told you those lies to you yesterday, just like he lied to everybody else in this case, because he has a motive to lie. Ladies and Gentlemen of the Jury, the defense during their arguments said, what’s this all about? This is what this is all about. This isn’t a fantasy tale. This is fact.”

¶ 55 Our review of the challenged remarks in context establishes that the prosecutor did not accuse defense counsel of lying or suborning perjury. The prosecutor’s use of the term “defense” referred the defense theory of involuntary manslaughter, which was testified to by defendant alone. The prosecutor’s one reference to defense counsel was to rebut a particular argument that counsel made about defendant’s credibility. It is entirely proper for a prosecutor to comment on the merits, likelihood and strength of the defendant’s case. *People v. Hooper*, 133 Ill. 2d 469, 489 (1989). We conclude that the challenged comments were properly aimed at discrediting the defense theory of involuntary manslaughter, not defense counsel. Accordingly, because no error

occurred here, defendant cannot meet his burden under the plain error analysis to establish clear and obvious error.

¶ 56 In the alternative, defendant argues that trial counsel's failure to object to the prosecutor's challenged remarks constituted a deficient performance and prejudiced defendant because this failure and the closely balanced evidence affected how the jury viewed the evidence and defendant.

¶ 57 In determining whether a defendant was denied effective assistance of counsel, we apply the familiar two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), and adopted by our supreme court in *People v. Albanese*, 104 Ill. 2d 504 (1984). To prevail on a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. *Strickland*, 466 U.S. at 687. To demonstrate performance deficiency, a defendant must establish that counsel's performance fell below an objective standard of reasonableness. *People v. Edwards*, 195 Ill. 2d 142, 163 (2001). In evaluating sufficient prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. If either prong of the *Strickland* test cannot be shown, then the defendant has not established ineffective assistance of counsel. *Id.* at 697.

¶ 58 Defendant's claim of ineffectiveness of counsel lacks merit because counsel was not deficient where any objection to the challenged remarks would have been futile because, as discussed above, those remarks properly expressed the prosecutor's opinion that, based on the

evidence presented, defendant was lying and his involuntary manslaughter defense theory was a fantasy.

¶ 59 C. Ineffective Assistance of Counsel

¶ 60 Defendant argues that he was deprived of the right to effective assistance of trial counsel because counsel inadequately presented the defense theory of involuntary manslaughter, *i.e.*, that defendant recklessly discharged his gun at the brick wall near where the victim stood and unintentionally shot the victim in the back of his head. Defendant argues counsel inadequately presented the involuntary manslaughter defense by (1) failing to call a ballistics expert to testify that the trigger pull of defendant's gun, which was six and a half to seven pounds, made the gun less accurate than a gun with a lighter trigger pull; (2) failing to use defendant's intoxicated condition to argue that his conduct was reckless; and (3) confusing the State's burden of proof during closing argument and thereby essentially conceding defendant's guilt of first degree murder.

¶ 61 Applying the *Strickland* standard discussed above, we conclude that defendant's claims of ineffective assistance of counsel lack merit; he fails to meet his burden to show that counsel's performance was deficient and that defendant suffered prejudice as a result. Defendant does not overcome the strong presumption that his counsel's representation fell within the wide range of reasonable professional assistance. See *People v. Ruiz*, 177 Ill. 2d 368, 385 (1997).

¶ 62 "Decisions concerning which witnesses to call at trial and what evidence to present are matters of trial strategy, and cannot form the basis for a claim of ineffective assistance of counsel unless a strategy is so unsound that counsel can be said to have entirely failed to conduct any meaningful adversarial testing." *People v. Negron*, 297 Ill. App. 3d 519, 538 (1998). Defendant's

claim concerning missing ballistics testimony from some unnamed expert is unsuitable for resolution on direct appeal because it involves matters that are *de hors* the record. See *People v. Ligon*, 239 Ill. 2d 94, 105 (2010). This claim presumes that counsel did not try to find an expert who could have testified that, given the facts of this case, the trigger pull could have had such a substantial effect on the accuracy of the gun despite evidence that defendant had pressed the muzzle of the gun against the victim's skin when defendant fired the gun. Such a claim should be brought on collateral review rather than on direct appeal. *Id.*

¶ 63 Defendant argues that trial counsel failed to use defendant's intoxication despite case law suggesting that handling a gun while intoxicated and pointing a gun at another has constituted reckless conduct for involuntary manslaughter purposes where the defendants claimed that the gun went off accidentally. Here, however, defendant did not merely handle or point the gun at the victim and did not claim that the gun went off accidentally. Rather, defendant testified that he intentionally cocked and pulled the trigger of his loaded gun. Furthermore, the record refutes defendant's assertion that trial counsel failed to use defendant's intoxicated condition to argue that his conduct showed recklessness rather than intent to commit murder. The record establishes that trial counsel made several references during closing argument that defendant and the victim were drinking and smoking marijuana at the strip club before the shooting. Counsel's choice regarding how much emphasis to give defendant's inebriated condition was a matter of trial strategy that is afforded considerable deference. See *People v. Smith*, 195 Ill. 2d 179, 195 (2000) (intoxication was not a viable defense where the defendant's detailed recall in his statements to the police showed that he was acutely aware of his surroundings and the occurrence witnesses stated that the defendant appeared to have no difficulty speaking or walking). We conclude that

defendant has failed to meet his burden to show that counsel's strategy was so unsound that counsel entirely failed to conduct any meaningful adversarial testing or that defendant was prejudiced by counsel's trial strategy.

¶ 64 Defendant claims that trial counsel essentially conceded defendant's guilt of knowing murder when counsel made a convoluted and confusing argument in an apparent attempt to distinguish between knowing and reckless conduct. To support this claim, defendant challenges his counsel's following remarks:

“That is stronger and different than what [the State has] to prove for involuntary manslaughter. Involuntary manslaughter is conscious disregard and known risk is likely – likely to cause death or great bodily harm. Strong probability for murder requires something else. In common parlance, it requires knowledge; and you know from common sense and life experience, that knowledge is knowledge. You know it was a strong probability, that you know. It's much, much, much stronger, much, much – you know that you're creating – that you're doing what you're doing.”

Defendant claims that this argument told the jury that defendant acted with knowledge that his actions created a strong probability of death or great bodily harm.

¶ 65 Although this excerpt of counsel's closing argument was not very clear, our review of this statement in the context of the entire closing argument of the State and the defense establishes that when defense counsel said, “You know it was a strong probability,” counsel was not conceding that defendant knew his conduct would cause the victim's death; rather, counsel was referring to the knowledge of a hypothetical person whose mental state must be evaluated by

a jury to determine whether knowing murder was committed. The record established that counsel stated several times during closing argument that defendant did not have the intent to kill and did not know that his actions created a likelihood of death or great bodily harm. Accordingly, defendant fails to show that counsel's performance fell below an objective standard of reasonableness.

¶ 66 We conclude that defendant's claims of ineffectiveness of counsel fail because the record establishes that counsel exercised sound trial strategy and counsel's performance did not fall below an objective standard of reasonableness.

¶ 67 D. Right to Confront Witnesses

¶ 68 Finally, defendant argues that his sixth amendment right to confront adverse witnesses was violated when the State's medical expert witness testified to an autopsy report prepared by a different pathologist.

¶ 69 Defendant forfeited review of this issue by failing to object to the testimony at trial and raise it in his posttrial motion (*People v. Enoch*, 122 Ill. 2d 176, 186-87 (1988)), and by failing to make a plain error argument (*People v. Freeman*, 404 Ill. App. 3d 978, 994 (2010)). Furthermore, the Illinois Supreme Court rejected this argument in *People v. Leach*, 2012 IL 111534, which held that an autopsy report was not testimonial and, thus, neither the admission of the report into evidence nor testimony about it violated the sixth amendment. *Id.* ¶ 137.

¶ 70 Defendant concedes that the decision in *Leach* precludes his claim but raises it here to preserve the issue for federal review.

¶ 71 III. CONCLUSION

¶ 72 For the foregoing reasons, we affirm the judgment of the trial court.

No. 1-15-1419

¶ 73 Affirmed.