2019 IL App (5th) 150144-U

NO. 5-15-0144

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Madison County.
	)	
v.	)	No. 13-CF-1767
	)	
SCOTTIE THOMPSON,	)	Honorable
	)	Richard L. Tognarelli,
Defendant-Appellant.	)	Judge, presiding.

JUSTICE CHAPMAN delivered the judgment of the court.
Presiding Justice Overstreet and Justice Welch concurred in the judgment.

ORDER

¶ 1 *Held*: Improper remarks during the State's closing argument did not rise to the level of plain error. The defendant was not deprived of a fair trial by the cumulative effect of those remarks and other asserted errors.

¶ 2 On the night of August 10, 2013, 20-year-old Dakota Jones left a pool hall with the defendant, Scottie Thompson. Early the next morning, Jones's body was discovered floating in Horseshoe Lake. Jones had sustained 28 blunt-force injuries, mostly to his head and chest. The defendant was charged with Jones's murder. At trial, the defendant conceded his guilt, but he asserted that he should be convicted of second degree murder rather than first degree murder. He admitted that he struck Jones with a hammer and left

him, badly injured, on a dock at Horseshoe Lake State Park. However, he claimed that he acted under an honest but unreasonable belief that it was necessary to act in self-defense, and he denied placing Jones in the water. The defendant appeals his conviction for first degree murder, arguing that the cumulative effect of numerous errors that occurred throughout the proceedings deprived him of a fair trial. The errors follow six themes. According to the defendant, the State (1) misstated his theory of the case, (2) misstated the law on second degree murder, (3) inserted factual and legal issues into the case that deprived him of the ability to present a defense, (4) gave jurors incorrect statements about the presumption of innocence, (5) stoked jurors' emotions, and (6) argued that the defendant had the propensity to commit murder. We affirm.

¶ 3 I. BACKGROUND

¶ 4 At the time the events at issue took place, the defendant was on mandatory supervised release (MSR) after serving 22½ years in prison for murder. One of the conditions of his MSR was a curfew, pursuant to which he was required to be home after 6 p.m. He wore an ankle bracelet with a tracking device to monitor his compliance with this requirement. On the evening of August 10, 2013, the defendant violated his curfew. He drove to Haymore's, an establishment in East St. Louis that has both a pool hall and a convenience store. He was unable to restart his vehicle. He asked several people in Haymore's to jump-start his car, but no one was willing to do so. He got assistance from a friend of his mother's, and then returned to Haymore's, where he met Dakota Jones. The two left together in the defendant's father's vehicle. That was the last time anyone would see Dakota Jones alive.

¶ 5 Early the next morning, Arthur Guyton discovered Jones's body floating in Horseshoe Lake while he was fishing, and he reported it to the police. Around the same time, police received a call about an abandoned vehicle in Washington Park. There was a blood-like substance on several areas of the exterior of the vehicle. The vehicle was registered to Timothy Thompson, the defendant's father, who passed away shortly before the events at issue took place.

¶ 6 The defendant was arrested at his mother's home later that day. Initially, he told police that he did not remember anything that happened on the night of August 10. Eventually, however, he claimed that he and Dakota Jones had an argument that escalated into violence when Jones swung a large stick at him. He claimed that he believed it was necessary for him to strike back at Jones in order to defend himself.

¶ 7 The defendant was indicted on charges of first degree murder. 720 ILCS 5/9-1(a)(1), (2) (West 2012). Prior to trial, the defendant filed a motion *in limine*, seeking to exclude evidence of his previous conviction for murder and evidence of the fact that he was on MSR when Jones was killed. The State agreed that it would not elicit evidence about the defendant's parole status in its case in chief, and the court indicated that it would revisit the question of whether evidence of the defendant's prior conviction was admissible if the defendant chose to testify.

¶ 8 The matter came for trial in February 2015. Resolution of the defendant's contentions on appeal requires us to examine the context in which the asserted errors occurred. We will therefore discuss the pertinent portions of the trial in detail.

¶ 9 The defendant asserts that the errors began during *voir dire*. The court began by correctly explaining to the prospective jurors all four of the principles annunciated by our supreme court in *People v. Zehr*, 103 Ill. 2d 472 (1984), as required by Illinois Supreme Court Rule 431(b) (eff. July 1, 2012). The court then asked the jurors, as a group, "Are there anyone—anyone here this morning that disagrees with any of those principles or thinks those principles are unfair?" The jurors were not asked at all about their understanding of the principles, and they were not given the opportunity to tell the court whether they accepted each individual principle. See *People v. Thompson*, 238 Ill. 2d 598, 607 (2010) (quoting Ill. S. Ct. R. 431, Committee Comments).

¶ 10 Both prosecutors and defense counsel questioned jurors about their understanding of the presumption of innocence. One of the prosecutors asked the first set of jurors, "If we prove the defendant guilty of first degree murder beyond a reasonable doubt, will you sign a guilty form—a guilty verdict form ***?" Other jurors were asked similarly-worded questions. However, in addressing other jurors, the prosecutor stated, "There is a presumption of innocence, and, as the defendant sits here today, he is presumed innocent *** until he's proven guilty. *Once he's proven guilty, his presumption of innocence is gone*." (Emphasis added.) She then asked jurors if they understood that. A second group of jurors was asked a similarly-worded question. Defense counsel also discussed the presumption of innocence at length, asking most jurors how they would vote if they did not believe that the State had met its burden of proving each element of the crime beyond a reasonable doubt. None of the attorneys reminded jurors that the presumption of innocence remains applicable during their deliberations.

¶ 11 Before the attorneys gave their opening statements, the court explained to the jury how the trial would proceed. In doing so, the court again explained the presumption of innocence and emphasized the importance of this principle. However, the court did not specifically remind jurors that the presumption is applicable during their deliberations.

¶ 12 Assistant State's Attorney Crystal Uhe began her opening statement by telling jurors that Dakota Jones was kind, outgoing, and willing to help people in need. She then said, "It was this willingness to help other people that this man, the defendant, preyed upon. And he used it to lure Dakota Jones away from his friends, away from his family, into his 1999 tan Buick Century, where he then proceeded to beat him and rob him and kill him." She told jurors that they would hear that Jones sustained at least 23 wounds to his head, chest, and back. She then told them, "But it wasn't the beating that killed him. After the defendant beat Dakota Jones in the back seat of his vehicle, Dakota Jones was still alive. And this man drove him to Horseshoe Lake, [and] dumped his body into the water of Horseshoe Lake, where he ultimately drowned."

¶ 13 Defense counsel Mary Copeland focused on the presumption of innocence during her opening statement. She concluded by telling jurors, "the cloak of innocence covers Mr. Thompson all the way through this trial, until you go back in the room to deliberate and make a decision."

¶ 14 The parties stipulated that the defendant was wearing an ankle monitoring device on the night Dakota Jones was killed. They stipulated that the device contained a remote signal that indicated whether the defendant was within 150 feet of his residence. They further stipulated that the system showed that he was out of this range from 6:59 to 7:29

p.m. on August 10, 2013, from 7:43 to 11:29 on August 10, and from 12:08 to 9:54 a.m. on August 11. This stipulation was read to the jury. We note that although jurors heard this stipulation and heard testimony from witnesses who recalled seeing the defendant wearing the monitor, the State did not specifically elicit testimony that the defendant was on MSR. However, one of the officers who testified did state that the defendant was arrested by "the parole division and U.S. marshals."

¶ 15 Four witnesses testified concerning the events that occurred at Haymore's before Dakota Jones left with the defendant. Jones's brothers, Raymond Roberts and Tevin Jones (Tevin), and Roberts' girlfriend, Maggie Bradley, all testified that on the night at issue, they went to Haymore's with Jones and other family members to shoot pool. There, they encountered the defendant. Both Tevin and Roberts heard the defendant asking people at Haymore's to jump-start his car. According to Roberts, the defendant indicated that he was worried about being late for something. Kevin Butler, who knew Dakota Jones socially, also encountered the defendant at Haymore's that night. Butler testified that the defendant asked him for a jump-start.

¶ 16 Roberts and Bradley left Haymore's for a while to visit Bradley's family. Both testified that while they were driving, they saw the defendant a block away from Haymore's, standing next to his car and holding jumper cables. They did not stop to help. When they returned to Haymore's, the defendant's car was parked in front of Haymore's. They also saw Dakota Jones in front of Haymore's. Both Roberts and Bradley testified that Bradley asked Jones to borrow $10 for gas. According to Bradley, Jones told her that he could not give her $10 at that time, but he assured her that he could give her money

the next day because he had $500. Both Bradley and Roberts testified that Jones showed Bradley his cash. Both also testified that when he did so, the defendant was standing next to his vehicle, which was parked behind theirs. Both Bradley and Roberts testified that they saw Jones get into the defendant's vehicle and ride away with him. They never saw Jones again.

¶ 17 Tevin and Butler also testified to seeing Dakota Jones holding a large amount of cash at Haymore's. Tevin testified that Jones "pulled out" $300 or $400 in the convenience store, presumably from an ATM. He testified that the defendant was in the store when this happened. Tevin further testified that at the pool hall, Jones bought drinks for their uncle, who was celebrating his birthday. Butler testified that he saw Jones take money out of his pocket and count it. Butler estimated that Jones had $700 or $800. He noted that he was across the room from Jones when he saw him count the money.

¶ 18 Additional witnesses testified about events that took place the following morning. Delaino Mattox testified that he spent the night of August 10, 2013, at his cousin's house in Washington Park. He was awakened the next morning by the sound of a car door slamming. He went outside and saw the driver of the vehicle bending over near the rear door on the driver's side. Mattox identified the driver as the defendant. He testified that he told the defendant to move the car, but the defendant said that he could not start it. Mattox helped the defendant push his car 20 to 30 feet so it was not in front of his cousin's house. While pushing the car, Mattox noticed blood on the side of the car "coming up from the door." When he asked the defendant about the blood, the defendant told him that he ran over a dead deer. After they moved the car, the defendant initially

attempted to flag down someone for assistance; however, he then left the scene. Mattox's cousin called the police to report the vehicle.

¶ 19 The defendant's cousin, Timothy Willis, testified that he ran into the defendant on the street early on the morning of August 11, 2013. The defendant told Willis that his car would not start. Willis attempted to jump-start the car, but was not successful. He testified that he then took the defendant to the nearby home of his friend, Etroy, who is a mechanic. Willis left the defendant at Etroy's house and went home. Willis testified that the defendant came to his house later that morning, went directly into the bathroom, and stayed there for approximately 10 minutes with the water running. The defendant asked Willis for a T-shirt and a bag, both of which Willis gave him. The defendant told Willis that he was in trouble. Willis testified that he saw the defendant again later that day at the defendant's mother's home. At that time, the defendant said that the car had been stolen.

¶ 20 Etroy Williams testified that at 6:30 or 7 that morning, Willis came to his house with his cousin. Willis asked Williams to work on his cousin's car, and then left. Williams testified that about five minutes later, Willis's cousin said, "Don't worry about it, the police are here." He then left Williams' house. Williams identified the defendant as Willis's cousin.

¶ 21 Dr. Raj Nanduri testified about the autopsy she performed on Dakota Jones, and her autopsy report was entered into evidence. In her report, Dr. Nanduri noted she observed a "large amount of blood oozing from the surface" of Jones's body and that his head "appeared to be collapsed due to underlying fractures." At trial, she testified that she observed a lot of blood on the sheet around Jones's body.

¶ 22 Dr. Nanduri described Jones's wounds in both her report and her trial testimony. She observed a total of 28 wounds, most of them on Jones's head and chest. Many of the wounds had a circular or semicircular pattern. Dr. Nanduri observed wounds to Jones's skull that appeared to have been inflicted with an instrument, and noted that fractured pieces of bone were visible through the scalp. She also noted that one of Jones's ribs was fractured. She testified at trial that the rib was pushed inward, penetrating Jones's lung. She explained that because the rib was pushed inward from Jones's back, she could determine that it was fractured due to an impact from behind.

¶ 23 At trial, Dr. Nanduri was asked about defensive wounds. She explained that when a decedent has been involved in a physical confrontation, typically there will be scratches or bruises on his hands or his fingernails will be broken. She examined Dakota Jones's hands for the presence of such injuries and found none.

¶ 24 Most significant for purposes of this appeal are the portions of Dr. Nanduri's report and testimony addressing Dakota Jones's cause of death and the significance of a white frothy substance she observed coming from Jones's mouth and nose. In her report, Dr. Nanduri noted that she observed a "large amount of whitish froth oozing from the mouth and the nose," but did not discuss the significance of this observation. She listed four categories of observations under the heading "Preliminary Autopsy Findings." Those categories were (1) craniocerebral blunt trauma, (2) blunt trauma to the chest, (3) additional injuries, and (4) drowning. Under the category of "additional injuries," she noted that there were scratches on Jones's neck. Under the category of "drowning," she

noted the presence of "pulmonary edema and congestion." She concluded that the cause of Jones's death was craniocerebral blunt trauma.

¶ 25 At trial, Dr. Nanduri testified that she observed a "perfuse whitish froth" coming from Jones's mouth. She explained that the froth indicated pulmonary edema, or fluid in the lungs, "and depending on where he was found, drowning would be a factor we need to consider." She further explained that the presence of the froth indicated that Jones was still breathing when he was in the lake. She testified that Dakota Jones died due to blunt trauma to his head.

¶ 26 On cross-examination, Dr. Nanduri acknowledged that in her report, she did not include drowning as a significant condition contributing to Jones's death. She further acknowledged she did not write in her report that the presence of the white froth indicated that Jones was alive when he entered the water. She explained that white froth is also present in cases of death due to drug overdose. She further explained, "I chose not to do that at that time, but even if he didn't have white froth in the drowning part, he would have still died. The basic cause of death would be blunt trauma to the head, yes." We note that Jones's blood was tested for the presence of drugs and alcohol 16 days after Dr. Nanduri performed her examination. His blood tested positive for the presence of cannabis, but negative for all other substances.

¶ 27 Although we need not discuss the physical evidence in detail, it is worth noting that the physical evidence linking the defendant to the crime was overwhelming. Investigators found blood on the trunk, rear door, and back seat of the vehicle. Crime scene investigator Abby Keller described the rear passenger side door as having a large

amount of blood on it that appeared to have dripped down the door. Inside the vehicle, investigators found a flashlight, a blue metal pipe, a crowbar, and a hammer. The flashlight, pipe, and crowbar all had blood on them. They found bloodstained clothing under the front seat that matched the description of the clothes Jones was wearing the night he died. A palm print that was visible in the blood on the trunk matched the defendant's palm print. DNA testing revealed that the blood found on the vehicle's trunk and door matched Dakota Jones's DNA. The blood on the flashlight and the pipe also matched Jones's DNA. The blood on the crowbar was consistent with being Jones's blood, but was not a complete profile and was therefore not a definitive match. Crime scene investigator Abigail Henn collected evidence from the back yard of the defendant's mother's home. There, she found tire tracks, blood on the ground, and "what appeared to be some sort of a clothing type article that had been burned." In some areas, there was a lot of blood. The blood collected from the back yard was consistent with being Jones's blood, but was not a definitive match.

¶ 28 The defendant testified on his own behalf. He was the only witness to do so. He testified that in 1989, he pled guilty to a charge of murder at the age of 17, and he was incarcerated on that charge until the age of 40. He testified that he witnessed a lot of violence in prison. When he was released from prison, he lived with relatives other than his parents. He believed that his parents' home would not be a good environment for him because his father used drugs and his mother drank. He testified, however, that about six months before the events at issue, he ran out of other options and moved in with his parents. He further testified that he found it difficult to find work and reintegrate into

society. He explained that because of these problems, he began using drugs again as "a coping mechanism."

¶ 29 The defendant testified that he was on parole with a home monitoring device in August of 2013. He noted that one condition of his parole was a 6 p.m. curfew. He admitted that during the early evening hours of August 10, 2013, he violated this curfew by going to the store to buy beer. When he left the store, his car would not start. He explained that the car he was driving belonged to his father, Timothy Thompson, but that he was the only person who drove the car after his father's death.

¶ 30 The defendant testified that when he could not start the car, he thought it might be out of gas, so he walked home to ask for help. He testified that he got help from a woman named Pansy, who was a friend of his mother's. Pansy took him to a gas station, gave him money to buy gas to fill a gas can, and then drove him back to his car. When the car still would not start, Pansy jump-started it for him. He then went to Haymore's, which he described as "the local hangout for drugs and prostitution."

¶ 31 The defendant did not remember how long he stayed at Haymore's, but he knew that he was there "for quite a while." When he left, he again could not start the car. He went into the pool hall in Haymore's to ask for a jump start, but no one would help him. He testified that he went back to his car, opened the hood, and managed to start the car after finding a wire connected to the starter. (We presume that he meant he found a loose wire.) It was at this point that he first encountered Dakota Jones.

¶ 32 According to the defendant, he was approached by Jones, a young man he had never met before, while standing next to his father's car. The defendant testified that

Jones asked for a ride to his girlfriend's house and offered to pay the defendant $10 for the ride. The defendant agreed to this exchange. He testified that once they were in the car, Jones offered him an additional $10 to drive him to Washington Park to buy drugs. The defendant again agreed.

¶ 33 When they arrived in Washington Park, however, Jones's contact was not there. The defendant testified that he and Jones waited for Jones's contact for an hour, during which time they drank beer, smoked marijuana, talked, and listened to music. After an hour, the defendant was ready to leave, but Jones wanted to stay and continue to wait. According to the defendant, he drove away with Jones still in the car, told Jones to pay him the money he had agreed to pay, and offered to drive him wherever he wanted to go. This led to an argument.

¶ 34 The defendant testified that he pulled the car over, and both he and Jones got out of the car and continued to argue over the money at the side of the road. According to the defendant, Jones picked up a "pretty big stick" that he found on the ground, cussed, and told the defendant that he was not going to pay him. At this point, according to the defendant, Jones swung the stick at him. The defendant stepped back, out of the way. He testified that he believed that Jones was trying to hurt him or kill him at this point. He explained, "I have been in prison for the last 22 and a half years so—and I seen a lot of violence in prison. So that came to my mind."

¶ 35 According to the defendant, Jones swung the stick at him at least three more times. At this point, he remembered that there was a hammer in the car, and went to get it. The defendant acknowledged that each time Jones swung the stick at him, he was able to step

out of the way. He also noted that one time, he was reaching into the car and the car door "absorbed some of the impact" from Jones's swing. The last time Jones swung the stick at him, the defendant swung the hammer at Jones. The defendant remembered that he struck Jones with the hammer twice. Asked about Dr. Nanduri's testimony describing wounds from 28 blows, he said, "I just don't remember."

¶ 36 The defendant testified that Jones fell to the ground, and he realized that Jones was hurt. The defendant testified that he panicked and did not know what to do. He put Jones in the back seat of his vehicle. As he did so, he noticed about $45 or $50 in Jones's pocket. He admitted that he took the money, explaining that it was the money Jones owed him. We note that the defendant was not asked to explain why he took all of Jones's money rather than only taking the $20 he claimed he had been promised.

¶ 37 The defendant testified that he then drove around with Jones in the vehicle. He admitted that he did not take him to a hospital, partly because he was scared, and partly because he did not initially realize how bad Jones's injuries were. The defendant testified that he drove to his mother's house, parked in the back yard, and "helped" Jones out of the car. It was at this point that he saw that Jones was bleeding. He explained that he was scared because he did not want to go back to prison and he did not think anyone would believe his explanation for what happened.

¶ 38 The defendant testified that he put Jones back into the car and drove around again, trying to decide what to do. He acknowledged that he could hear Jones moaning in the back seat of the car as he drove. The defendant testified that he drove into Horseshoe Lake State Park, something he did not plan to do. Once there, he dragged Jones to the

boat dock, where he splashed some water on him to try to clean off the blood. He testified that he left Jones on the dock, hoping someone would find him.

¶ 39 The defendant testified that after leaving Jones on the dock, he again drove around aimlessly. He picked up a prostitute, but told her that he did not have enough money for her services. Instead, the woman asked him to take her to Washington Park to buy drugs. According to the defendant, he drove her to Washington Park, and then drove around with her smoking crack cocaine. At some point, the defendant parked the vehicle, and he was again unable to start it. The woman got out of the car, left, and never came back.

¶ 40 The remainder of the defendant's testimony was largely consistent with the testimony of Delaino Mattox, Timothy Willis, and Etroy Williams. He testified that a man came out of a nearby house, told him to move the car, and helped him push it. He then saw his cousin, Tim Willis, down the street. He testified that Willis told him he had a friend who could repair the car, and they went to that friend's house. The defendant testified that he looked out the window, saw a police car arriving, panicked, and fled the scene on foot. He testified that he then went to Willis's house and washed his hands and face. He did not remember what he told Willis, but he admitted it was not the truth. He also admitted that he was not honest when he was interviewed by police following his arrest.

¶ 41 On cross-examination, the defendant admitted that he killed Dakota Jones, and acknowledged that he did not know Jones. Assistant State's Attorney Vucich asked the defendant how long he was out of prison before he "murdered someone else." The defendant replied that he had been free for approximately a year and a half. Vucich then

asked, "Was the first person you murdered a stranger too?" The court sustained defense counsel's objection.

¶ 42 In response to further questioning, the defendant admitted that when asked by someone from the ankle monitor company why he violated his curfew, he told her, "I was just out enjoying my life."

¶ 43 The following exchange then took place:

> "Q. You talked to people since this and said, 'I am screwed. My stuff is all over that crime scene. My best shot is to claim self-defense and ask for second-degree murder,' haven't you?
>
> MS. COPELAND: Objection, Your Honor.
>
> THE COURT: Sustained.
>
> MS. VUCICH: Your Honor, [it would] be a party opponent statement. I think I can get into what he said that other people—
>
> THE COURT: Foundation.
>
> MS. COPELAND: I have been provided with no such statement."

Vucich moved on to other matters. In response to additional questioning, the defendant acknowledged that he did not tell anyone that Jones swung a stick at him until 18 months after the incident occurred.

¶ 44 At the jury instruction conference, the State argued that there was insufficient evidence to justify an instruction on second degree murder. The State contended that the force used by the defendant was disproportionate to the force he claimed Jones used against him, and that the defense of self-defense is not available when a murder is

committed during the commission of a violent felony, such as robbery. Prosecutor Crystal Uhe noted that the defendant admitted in his testimony that "there was a dispute over money, and this dispute ended with him taking force against the victim and forcibly taking money out of the pocket." Defense counsel argued that the defendant had not been charged with felony murder. In response, Uhe argued, "This is the first time we are hearing the story of the robbery. So at this point I don't believe that precludes us from arguing that it was a forcible felony that was occurring." We note that, as mentioned earlier, Uhe told jurors during her opening statement that the evidence would show that the defendant robbed Dakota Jones, and the State elicited the testimony from four witnesses that Jones took out a large amount of money in front of the defendant at Haymore's. The court decided to give a second degree murder instruction over the State's objection.

¶ 45 The State then requested an instruction telling jurors that if they find that the defendant was committing a violent felony, they must find that he was not justified in the use of force. Defense counsel argued that the evidence did not support a finding that a robbery occurred. The court agreed to give the instruction. Neither party requested instructions on the definition and elements of robbery.

¶ 46 Because most of the defendant's arguments on appeal involve remarks made during the State's closing argument, we must discuss that argument in detail. Prosecutor Jennifer Vucich began by telling jurors, "Dakota Jones was 20 years old. He was kind. He was outgoing. And there is only one name for what the defendant did to him in the State of Illinois. And that's first degree murder." She then argued that the testimony of all

22 witnesses, including the defendant, pointed to the defendant being guilty of first degree murder. She argued, "I submit to you that witness number 23 is Dakota Jones. You see, Dakota was stripped of the right to come in here and tell you what really happened to him because the defendant took that away from him, from us." She argued, however, that Jones left his body as compelling evidence of what took place.

¶ 47 Vucich next discussed the evidence of Jones's injuries and the crime scene photographs that were entered into evidence, including photographs that showed "blood dripping out of the car." She told jurors, "The pictures that you saw are the work of a cold-blooded murderer. And you heard that's what he is. He's a murderer."

¶ 48 Vucich highlighted the defendant's testimony that he drove around while Jones was bleeding and moaning in the back seat of his car. She said, "What does he have to say about all this? 'It was an accident. I was scared. I didn't know what to do.' " Vucich reminded jurors that the defendant testified that he picked up a prostitute and smoked crack. She argued that those are "[n]ot the actions of someone who just had a fight and who just accidentally killed someone. Those are the actions of a murderer."

¶ 49 Vucich argued that after hearing the evidence against him, the defendant knew his only hope was to say that Jones started the fight. She argued that the defendant could not admit to putting Jones in the lake "because he heard Dr. Nanduri say that Dakota also died from drowning." She further argued that the defendant's testimony that he left Jones on the dock was not credible. She noted that only a few drops of blood were found on the dock, while large amounts of blood were found in the vehicle and the back yard. She argued that if Jones were left lying on the dock, more blood would have been found there.

¶ 50 Vucich reminded jurors of the testimony about the defendant's behavior after the murder. She argued that his actions were those of a murderer, not those of someone who was just afraid. Vucich emphasized the fact that he never told anyone, including his cousin, that he had been in a fight. She reminded jurors that when the defendant called the ankle monitor company about his curfew violation, he did not say that he was in a fight; instead, he told the employee he spoke with that he was "just out enjoying his life." Vucich then told jurors, "To this one, murdering someone is enjoying his life. That's what he's doing. That's how this one enjoys his life. He murders people."

¶ 51 Vucich went on to discuss the presumption of innocence enjoyed by the defendant. She told jurors, "And as he walked into this courtroom, he had a presumption of innocence. And it's gone. It's been long gone because he's been proven guilty beyond a reasonable doubt of first degree murder."

¶ 52 She next explained to jurors the three elements that the State is required to prove beyond a reasonable doubt: (1) that the defendant killed Dakota Jones; (2) that he did so intentionally or knowing that his actions created a high probability of death; and (3) that he was not justified. In addressing the third element, Vucich explained to jurors that they should find the defendant guilty of first degree murder, rather than second degree murder, unless they find that the defendant proved by a preponderance of the evidence that a mitigating factor was present. "What that means," she explained, "is that it is his burden to prove to you that he was justified in this use of force."

¶ 53 Vucich went on to argue that the defendant failed to meet his burden. She argued that even assuming the defendant's testimony that Jones swung a stick at him was true,

there was no justification for delivering 28 blows, failing to seek medical help, and throwing Jones into the lake. She then argued, "For him to say to you that he believed that he was in imminent harm of receiving great bodily harm after Dakota was hit 28 times is ridiculous." Vucich further argued that the defendant was not justified in the use of force if he was committing a robbery. She told jurors that the defendant knew Jones had a lot of cash on him because he had seen Jones flashing his cash at Haymore's.

¶ 54 Finally, Vucich returned to the theme of the "cloak of innocence" the defendant had when he entered the courtroom. "What about Dakota Jones's cloak of innocence?" she asked jurors. She concluded by stating: "This isn't about the defendant being institutionalized and being justified in beating this boy *** 28 times and throwing him into a lake. This is about the fact that he committed first degree murder on that boy. The law requires that you find him guilty of first degree murder."

¶ 55 Defense counsel Copeland began her closing argument by conceding that the defendant was guilty of murder. She argued, however, "But he is guilty of second degree murder, not first degree murder."

¶ 56 Copeland explained to jurors that once the State proves beyond a reasonable doubt that the defendant committed acts that he "knew or should have known could result in Dakota's death," the burden of proof shifts "slightly" to the defendant. She told jurors, "He only has to convince you that it's more likely than not that the circumstances existed at the time to make him believe that deadly force was necessary, even though that belief was not reasonable." Copeland clarified that the defendant was not arguing that his actions were, in fact, justified. "If that was his defense," she told jurors, "he would be

asking you for a not guilty verdict." Instead, she explained, the issue before the jury was whether "circumstances existed that led him to believe in that moment [that] deadly force was necessary."

¶ 57 She went on to argue that the defendant had proven that such circumstances existed. She emphasized the defendant's testimony that Jones swung the stick at him multiple times, and she told jurors that no physical evidence contradicted this claim. She also argued that the defendant's experience of being in the violent atmosphere of prison for 22 years shaped his perception of and reaction to stressful situations.

¶ 58 Assistant State's Attorney Vucich began her rebuttal argument, "Poor Scottie Thompson. Poor, poor Scottie Thompson. Ladies and gentlemen, if you go back in that deliberation and you take 30 seconds to think about this man's poor life, I promise you you've spent 30 more seconds than he ever thought about poor Dakota Jones's life." She told jurors, "It's ridiculous for him to say that this was justified." She went on to argue, "I know what happened. He hit him twice and then he snapped. Because he's a murderer and he hit him 26 more times and he hid evidence and he put his body in a lake." Vucich reminded jurors that the defendant testified that he did not "expect anyone to believe his story." She argued that jurors should not believe him either because it was "not believable that he was in fear for his life."

¶ 59 Finally, Vucich argued as follows:

> "You've been instructed all week that you cannot talk to your family about this. That you're not to go online. You're not to speak to people about this. But tonight you can, when you're done. You can go home and talk to your family. They're

> going to say, 'Hey, how was the trial?' Are you going to say, 'Um, it was about a convicted murderer who beat a kid about the body 28 times and the kid had bone deep wounds to the back of his head and he was dumped in a lake. Oh, we found second degree murder.' That doesn't make any sense."

Vucich concluded by telling jurors she expected jurors to follow the law as instructed and to find the defendant guilty of first degree murder.

¶ 60 The court then instructed the jury. In relevant part, the court instructed jurors that the presumption of innocence remains with the defendant throughout the trial, including during deliberations. The court provided the jury with the correct definition of second degree murder. The court told jurors that opening statements and closing arguments are not evidence, and it told them that evidence of the defendant's previous conviction may be considered only as evidence affecting his credibility as a witness, not as evidence of his guilt. Finally, as discussed previously, the court instructed jurors that a defendant is not justified in using deadly force in self-defense if it happens during a robbery, but did not instruct the jury on the elements or definition of robbery.

¶ 61 The jury returned a verdict of guilty of first degree murder. The defendant filed a motion for a new trial, which the court denied. The court then sentenced the defendant to natural life in prison. This appeal followed.

¶ 62 II. ANALYSIS

¶ 63 As noted previously, the defendant argues on appeal that he was deprived of the right to a fair trial due to the cumulative effect of numerous errors. He argues that the State undermined his ability to present a defense at all by (1) mischaracterizing the

defendant's theory of the case as self-defense and/or accident; (2) misstating the law on second degree murder; (3) arguing that Dakota Jones's sole cause of death was drowning, which, he contends, was not supported by the evidence; and (4) raising the theory that the defendant robbed Jones for the first time at trial. In addition, the defendant argues that (1) the State made comments designed to stoke jurors' emotions, during both its opening statement and closing argument; (2) the State gave erroneous definitions of the presumption of innocence during *voir dire* and closing arguments, an error exacerbated by the court's failure to fully comply with Rule 431(b) during *voir dire*; and (3) the State argued that jurors should find the defendant guilty because of his propensity to commit the crime, an error exacerbated by improper questions during its cross-examination of the defendant.

¶ 64 We begin our analysis by noting that the defendant did not object to most of the errors he asserts took place. Ordinarily, failure to object at trial leads to forfeiture of a claim on appeal. *People v. Lovejoy*, 235 Ill. 2d 97, 148 (2009). However, the plain error doctrine allows this court to review claims in spite of the defendant's forfeiture "when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). In this case, the defendant argues that the cumulative effect of numerous errors "created a pervasive pattern of unfair prejudice" that undermined his right to a fair trial. See *People v. Blue*, 189 Ill. 2d 99, 139 (2000). We analyze this contention applying the same test we use when applying the second prong of the plain error test. That is, we determine "whether a substantial right has been affected to such a degree that we cannot

confidently state that [the] defendant's trial was fundamentally fair." *Id*. at 138. The first step in plain error analysis is to determine whether a plain or obvious error occurred at all. *Lovejoy*, 235 Ill. 2d at 148; *Herron*, 215 Ill. 2d at 187. We will therefore consider whether each of the errors asserted by the defendant occurred at all before deciding whether any individual error rose to the level of plain error or whether the cumulative effect of the asserted errors warrants reversal under *Blue*.

¶ 65 As mentioned previously, most of the defendant's claims of error involve remarks made during the State's closing argument. Prosecutors are afforded wide latitude during closing argument. *Blue*, 189 Ill. 2d at 127. They may comment on the evidence presented and may argue any reasonable inferences that flow from that evidence. *Id.* They may not, however, argue facts not in evidence or assumptions not based on the evidence. *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). They also may not misstate the law. See *People v. Brooks*, 345 Ill. App. 3d 945, 950 (2004).

¶ 66 Prosecutors may comment on "the evil effects of the crime and urge the jury to administer the law without fear." *People v. Nicholas*, 218 Ill. 2d 104, 121-22 (2005). However, prosecutors generally may not "characterize the defendant as an 'evil' person or cast the jury's decision as a choice between 'good and evil.' " *Id*. at 121. Prosecutors may comment on the credibility or persuasiveness of the defendant's theory of the case. *People v. Abadia*, 328 Ill. App. 3d 669, 678 (2001). But it is improper to imply that defense counsel has presented a defense that was fabricated unless there is evidence to support this suggestion. *Id*. at 679. It is also improper to disparage the integrity of defense

counsel (*id.*) or to ridicule the defendant's theory of the case (see *Glasper*, 234 Ill. 2d at 210).

¶ 67 Finally, despite the wide latitude they are allowed, prosecutors must not engage in argument that serves no purpose other than to inflame the passions of the jury. *Nicholas*, 218 Ill. 2d at 121; *Blue*, 189 Ill. 2d at 128. We must consider the propriety of the challenged remarks in the context of closing arguments in their entirety. *Blue*, 189 Ill. 2d at 128.

¶ 68 A defendant seeking the reversal of a conviction on the basis of improper closing argument faces a difficult burden. *People v. Gutierrez*, 402 Ill. App. 3d 866, 895 (2010). Even if the defendant does object to improper remarks at trial, reversal is warranted only if the improper remarks result in substantial prejudice. *Abadia*, 328 Ill. App. 3d at 678. That is to say, reversal is only warranted if the improper remarks are a material factor in the jury's verdict. *Gutierrez*, 402 Ill. App. 3d at 895. Although it is difficult to overturn a conviction based primarily on improper closing arguments, it is not impossible. Improper arguments can undermine a defendant's substantial rights, and if the prosecutor's remarks have the "effect of undermining the entire trial, reversal for a new trial is warranted." *Brooks*, 345 Ill. App. 3d at 953.

¶ 69 A. Statements on the Defendant's Theory and the Applicable Law

¶ 70 We first consider the defendant's related arguments that the State mischaracterized his defense as either accident or self-defense and misstated the law regarding second degree murder. We may quickly dispose of his argument that the State mischaracterized his defense as accident. In support of this argument, the defendant points to a remark in

which Vucich stated that the defendant said the killing of Dakota Jones was an accident and remarks in which she argued that his actions were not the actions of someone who got into a fight and accidentally killed another person. The defendant correctly notes that he did not testify that he killed Jones accidently. As such, these remarks were not supported by the evidence and were, therefore, improper. However, we believe these remarks were too isolated to leave jurors with the incorrect impression that he was claiming the killing was accidental.

¶ 71 The defendant also challenges remarks in which Vucich implied that the defendant was asserting self-defense and remarks in which she incorrectly stated the law regarding second degree murder. Before addressing these points, it would be helpful to discuss the difference between self-defense and second degree murder based on what is often referred to as "imperfect self-defense."

¶ 72 In Illinois, conduct that would otherwise constitute first degree murder instead constitutes second degree murder if either of two statutory mitigating circumstances are present. 720 ILCS 5/9-2(a) (West 2012). The mitigating circumstance at issue here is the defendant's claim that, at the time of the killing, he believed circumstances were present that would have justified the killing based on self-defense had they actually been present. See *id.* § 9-2(a)(2). As noted, this mitigating circumstance is generally referred to as "imperfect self-defense." *People v. Jeffries*, 164 Ill. 2d 104, 113 (1995). A conviction for second degree murder based on imperfect self-defense is appropriate in a case where "there is sufficient evidence that the defendant believed he was acting in self-defense, but that belief is objectively unreasonable." *Id.* Although self-defense and second degree

murder based on imperfect self-defense are factually intertwined and are ordinarily raised together (see *id*. at 126), as we will explain next, there are some crucial distinctions between them.

¶ 73 In order to prove a defendant guilty of first degree murder, the State must prove beyond a reasonable doubt that the killing was not legally justified, in addition to proving the other elements. *Id*. at 127. The affirmative defense of self-defense is recognized as a legal justification. *Id*. In order to have the jury instructed on self-defense, a defendant must present at least some evidence of each of the elements of self-defense, including evidence that he subjectively believed that an imminent threat of force existed *and* that this belief was objectively reasonable. *Id*. at 128. Once the defendant raises the issue of self-defense, the State must disprove at least one element of the defense beyond a reasonable doubt. *Id*. This is because, as we have already noted, lack of legal justification is one of the elements the State must prove in order to convict a defendant of murder. *Id*. at 127.

¶ 74 If the State disproves *any* element of self-defense, the killing is not legally justified by that affirmative defense. *Id*. at 128. Thus, for example, if the State proves beyond a reasonable doubt that the defendant's belief in the need to use deadly force in self-defense was not objectively reasonable, it has met its burden of proving that the killing was not legally justified. It is in this context that second degree murder based on imperfect self-defense ordinarily arises. See *id*. at 126, 129.

¶ 75 To prove a defendant guilty of second degree murder, the State must prove all three elements of first degree murder beyond a reasonable doubt—including the lack of

legal justification, if that issue is raised. 720 ILCS 5/9-2(c) (West 2012); see also *Jeffries*, 164 Ill. 2d at 118. As we noted earlier, the issues of self-defense and second degree murder based on imperfect self-defense are ordinarily raised together. See *Jeffries*, 164 Ill. 2d at 126. Thus, ordinarily, it is only after the State "has successfully negated the defendant's claim of self-defense and has proven each of the other elements of first degree murder" that jurors may even proceed to consider whether the defendant has demonstrated that he should be convicted of second degree murder based on the mitigating factor of imperfect self-defense. *Id.* at 128-29. Once the State proves its case beyond a reasonable doubt, it is the defendant's burden to prove by a preponderance of the evidence that a mitigating factor was present. 720 ILCS 5/9-2(c) (West 2012).

¶ 76 In the instant case, the defendant did not attempt to argue that the killing of Dakota Jones was justified based on self-defense. He conceded that his belief in the need to use deadly force in self-defense was not objectively reasonable. He also conceded that the State proved the other elements of murder. Thus, the only issue before the jury was whether the defendant had successfully proved the mitigating factor of imperfect self-defense.

¶ 77 This brings us to the defendant's argument that Assistant State's Attorney Vucich improperly mischaracterized his theory of the case as self-defense. In her initial argument, Vucich argued that inflicting 28 blows with a hammer, leaving Jones's body in the water, and failing to get help were not justified. She also asked jurors what evidence the defendant presented to show that the killing was justified. In rebuttal, she argued, "It's ridiculous for him to say that this was justified." However, some of Vucich's other

remarks accurately reflected that the defendant was asking jurors to find only that he subjectively believed his actions were justified at the time. For example, she argued that in the face of the evidence presented, it was ridiculous for the defendant "to say he *believed* that he was in imminent [danger] of receiving great bodily harm." (Emphasis added.) In rebuttal, she argued that it was not believable that the defendant feared for his life. Nevertheless, we agree with the defendant that these comments were, at the very least, potentially confusing.

¶ 78 Under the circumstances of this case, however, we do not believe jurors were likely to be misled or confused. As we discussed earlier, defense counsel very clearly stated during her closing argument that the defendant was not arguing that his belief was reasonable or that his conduct was legally justified. And she very clearly explained that the defendant was only arguing that he subjectively believed that he needed to use deadly force in self-defense. The focus of the defense's closing argument was on the ways in which the defendant's life experiences led him to subjectively see an imminent risk of harm even though that belief was not objectively reasonable.

¶ 79 Similarly, the defendant contends that Vucich misstated the law of second degree murder. She correctly told jurors that the defendant had the burden of proving a mitigating circumstance, but then she incorrectly told them that to do so, he was required to prove he was justified in using deadly force. As discussed earlier, he need only prove that he believed circumstances existed under which the use of force would have been justified were they true. See 720 ILCS 5/9-2(a)(2) (West 2012). We are not persuaded that jurors were confused by this remark because both defense counsel and the court

clearly and accurately explained the applicable law to the jury. Proper jury instructions are often sufficient to cure any prejudice from a prosecutor's misstatement of the law. See *Brooks*, 345 Ill. App. 3d at 950.

¶ 80 B. Injection of Additional Issues

¶ 81 The defendant contends that the State undermined his ability to present his theory of the case in two additional ways: (1) the State argued that Dakota Jones drowned, an argument he contends was based on "surprise" testimony from Dr. Nanduri and not supported by the evidence; and (2) the State "raised the specter of an uncharged felony"—robbery—for the first time at trial. We consider these arguments in turn.

¶ 82 1. *Drowning*

¶ 83 The defendant contends that there was no basis for Dr. Nanduri's "surprise" testimony that Jones was alive when he entered the water and that the State's argument that Jones drowned was not supported by the evidence. He further contends that he was deprived of the ability to present his defense by the State's claim that Jones drowned. We disagree.

¶ 84 We first consider the evidence at issue. As discussed previously, Dr. Nanduri did indicate in her report that drowning was a preliminary autopsy finding. Under the heading of "final autopsy findings," she wrote, "Remains the same as preliminary report." However, as the defendant emphasizes, the only cause of death she listed was craniocerebral blunt trauma. Asked about this at trial, Dr. Nanduri explained that in her opinion, Jones would have died of his head injuries whether he drowned or not. She also explained that the white frothy substance she observed coming from Dakota Jones's

mouth and nose can result either from drowning or a drug overdose. As we noted earlier, Jones's blood was tested for the presence of drugs 16 days after Dr. Nanduri performed her autopsy. A toxicology report was attached to Dr. Nanduri's autopsy report. It showed that Jones had cannabis in his system, but the test results were negative for any other substances. The individual who performed the test did not testify at trial. Obviously, at the time Dr. Nanduri completed her autopsy report, the toxicology results were not yet available. When she testified at trial, however, Dr. Nanduri was aware of these results, which likely led her to conclude that the white froth was not the result of a drug overdose.

¶ 85 We now address the defendant's claims of prejudice. He first challenges a remark during opening statement where prosecutor Crystal Uhe predicted that the evidence would show that "it wasn't the beating" that killed Dakota Jones. Although the evidence did show that Jones was alive when he entered the lake, we agree with the defendant that the evidence we have just discussed did not show that drowning was the *sole* cause of death. However, opening statements are simply a recitation of what the attorneys *expect* the evidence to show. Reversal is warranted only if a remark results from intentional prosecutorial misconduct and substantially prejudices the defendant. *People v. Kliner*, 185 Ill. 2d 81, 127 (1998).

¶ 86 We are not convinced by the defendant's claim that he was prejudiced by Dr. Nanduri's "surprise" testimony that the white froth indicated that Jones was alive when he entered the water. It is true that Dr. Nanduri did not include this opinion in her report. It is also true that the State presented no evidence explaining the basis for her opinion—which likely involved the toxicology findings. However, this line of questioning could

hardly have surprised defense counsel. The indictment charged that the defendant killed Jones by beating him "about the head with a blunt force object and plac[ing] [him] in a body of water." Counsel was also aware of the toxicology report.

¶ 87 Moreover, the overwhelming evidence suggested that Jones was alive when he entered the lake. The defendant himself testified that Jones was alive when he drove him to Horseshoe Lake. And in spite of the defendant's claim that he left Jones on the dock, the evidence suggested otherwise. The defendant admitted that Jones was moaning and "not verbal" while he was driving him around, and he admitted that in order to move Jones from the car to the dock, he had to drag him. In addition, as noted by Vucich in closing argument, the fact that investigators found only a small amount of blood on the dock also suggested that the defendant dropped Jones into the lake as soon as he got there.

¶ 88 The defendant also challenges a remark during closing argument in which Vucich told jurors that Jones "also died from drowning." We believe this was a reasonable inference from the evidence presented. As such, we find that the remark was not improper. Moreover, the gist of the State's argument was that the defendant's entire course of conduct after the killing contradicted his claim that he believed he was justified in acting in self-defense—he drove around with an injured Jones and put him in a lake rather than getting him medical help; he then smoked crack cocaine with a prostitute as though nothing traumatic had just occurred; and he took steps to evade police and to conceal or destroy evidence. The extent to which drowning may have contributed to Jones's death was, realistically, not a crucial point.

¶ 89 2. *Robbery*

¶ 90 We next consider the defendant's argument that the State undermined his right to present a defense by inserting the issue of robbery into the case through jury instructions. He points to an instruction telling jurors that a killing is not justified based on self-defense if it occurs during the commission of a robbery. We are not persuaded.

¶ 91 Jury instructions convey to jurors the legal principles applicable to the evidence before them. *People v. Mohr*, 228 Ill. 2d 53, 65 (2008). Instructions must be clear enough to avoid misleading jurors. *Id*. at 66. The question for this court on appeal is whether the instructions given, considered in their entirety, fully and fairly apprised the jury of the law applicable to both parties' theories of the case. *Id*. at 65. We will reverse only if we find that the trial court abused its discretion in deciding to give or refuse an instruction. *Id*. at 66.

¶ 92 The defendant argues that because the State did not charge him with robbery or with felony murder based on robbery, its decision to request the challenged instruction caused unfair surprise and deprived him of an opportunity to defend against the unforeseen allegation that Jones was killed during a robbery. In support of this contention, the defendant relies heavily on *People v. McDonald*, 401 Ill. App. 3d 54 (2010). We find *McDonald* distinguishable.

¶ 93 There, the defendant was charged with the murder of his romantic partner. *Id*. at 55-56. As in this case, he was charged with intentional and knowing murder, but was not charged with felony murder or robbery. *Id*. at 55. The events underlying the charges stemmed from an argument that turned violent. The defendant's partner left the apartment

they shared in the morning, riding his bicycle. *Id*. at 56. When he returned that evening, the two men got into a heated argument, during which the defendant accused his partner of infidelity. The defendant attempted to grab the bicycle and take it to their apartment, and the men struggled over the bicycle. *Id*. According to the defendant, his partner struck him during this struggle. The defendant grabbed a butcher knife and stabbed his partner. *Id*.

¶ 94 Over the defendant's objection, the trial court agreed to give the jury instructions on armed robbery and an instruction explaining that the defense of self-defense is not available if the killing takes place during the commission of a violent felony such as armed robbery. *Id*. at 58. The defendant appealed his conviction, arguing, as the defendant does here, that those instructions prejudiced him by "injecting into the trial, at its end, a new charge against him." *Id*. at 60. He argued that, had he known in advance that the issue of armed robbery would be raised, he could have prepared to defend himself against that charge. *Id*.

¶ 95 In accepting this argument, the appellate court first noted that under some circumstances, giving jury instructions "that introduce elements or offenses with which a defendant was not properly charged" can constitute reversible error. *Id*. at 61. The court noted that in the case before it, the prosecution did not mention the issue of armed robbery during its opening statement or present any evidence related to that offense. *Id*. at 62. The court explained that the only evidence related to the question of armed robbery was the evidence that the defendant stabbed his partner after struggling with him over the bicycle during an argument about infidelity. *Id*. at 63. It was in this context that the court

observed that the fact that the State did not charge the defendant with armed robbery or felony murder "suggest[ed] that the prosecutor did not believe there had been an armed robbery." *Id*. at 64. The *McDonald* court found that the prosecutor's decision to raise the issue of armed robbery only at the end of the trial, after both parties had rested, could have prejudiced the defendant by leading jurors to believe that the State had "definitively established" that the crime occurred. *Id*. at 61-62.

¶ 96 In this case, by contrast, the prosecution told jurors in its opening statement that the evidence would show that the defendant robbed Dakota Jones. Four State witnesses testified that Jones made it obvious to everyone at Haymore's that night, including the defendant, that he had a substantial amount of cash on him. We note that the defendant does not allege in this appeal that this testimony took him by surprise or that the State failed to disclose the expected testimony of these witnesses. However, the only evidence that the defendant actually took money from Jones came during his own testimony. The defendant, of course, has the constitutional right not to testify, and prosecutors did not know whether he would testify at all prior to trial. Thus, they did not know whether they would have enough evidence to prove a charge of robbery beyond a reasonable doubt. In spite of prosecutors' decision not to charge the defendant with robbery or felony murder, it could come as no surprise that they intended to present evidence showing that the motive for Jones's murder was robbery or attempted robbery. Thus, the issue of robbery was not improperly inserted into the trial at the last minute.

¶ 97 As a general matter, a jury instruction is justified if there is evidence in the record to support it. *Mohr*, 228 Ill. 2d at 65. The defendant's testimony that he took money from

Jones's pocket after beating him with a hammer was sufficient to support the instruction telling jurors that the defendant would not have been justified in the use of force during the commission of a robbery. Therefore, the court did not abuse its discretion in giving the instruction.

¶ 98 The defendant also argues, however, that jurors were likely confused because they were not also instructed on the elements of robbery. As noted earlier, jury instructions need to be clear enough to avoid confusing jurors. *Id*. at 66. However, the defendant never requested instructions defining and explaining the elements of robbery. As such, he has forfeited review of this claim. *Id*. at 64-65.

¶ 99 C. Inflaming the Passions of the Jury

¶ 100 We turn now to the defendant's contention that the State made comments designed to stoke jurors' emotions and inflame their passions during both its opening statement and closing arguments. He first points to statements made by prosecutor Crystal Uhe during the State's opening statement. As discussed earlier, Uhe told jurors that the defendant used Jones's willingness to help others to "prey upon" him and to "lure him away" from his friends and family. The defendant complains that these statements "improperly compared [him] to an animal on the hunt." We do not agree with this characterization of the statement. In support of this contention, the defendant cites *People v. Johnson*, 208 Ill. 2d 53 (2003). There, the prosecutor argued that the defendant was accountable for the actions of a codefendant. He told jurors, "If you run with the pack, you share the kill." *Id.* at 80. Uhe's statements stand in stark contrast to the remark challenged in *Johnson*. We find that they were not improper.

¶ 101 The defendant also challenges several remarks made by Vucich during the State's closing argument. As we stated previously, prosecutors must not make arguments that serve no purpose other than to inflame the passions of the jurors. See *Nicholas*, 218 Ill. 2d at 121; *Blue*, 189 Ill. 2d at 128. The defendant argues that Vucich improperly appealed to jurors' sense of sympathy by describing Jones as kind and helpful, a theme which repeated the description Uhe used in her opening statement. We do not find these isolated and somewhat innocuous statements to be inflammatory or prejudicial.

¶ 102 The remainder of the remarks the defendant challenges are more problematic. For example, Vucich told jurors that Dakota Jones was "stripped of the right" to tell jurors what happened to him, argued that the defendant did not spend even 30 seconds thinking about Jones's life, and asked jurors, "What about Dakota Jones's cloak of innocence?" Most egregiously, Vucich urged jurors to consider what they would say to their families if they returned a verdict of second degree murder. We agree with the defendant that these remarks were improper. As discussed previously, however, the defendant did not object to the remarks at trial. We do not believe the remarks rose to the level of plain error.

¶ 103 D. Statements on the Presumption of Innocence

¶ 104 We next address the defendant's argument that jurors repeatedly heard incorrect definitions of the presumption of innocence throughout the trial, which allowed them to mistakenly believe that the presumption of innocence no longer applied during their deliberations. Although we agree that the prosecutor made improper remarks concerning the presumption of innocence during her closing argument, we do not agree that jurors

were left with the mistaken impression that the presumption of innocence no longer applied during deliberations.

¶ 105 The defendant argues that the problem began during *voir dire*. He acknowledges that the court correctly informed jurors that the presumption of innocence "remains with the defendant throughout the—every stage of this trial, *even through your deliberations* on your verdict." (Emphasis added.) However, he notes that prosecutors asked some prospective jurors if they understood that the defendant's presumption of innocence would be "gone" once he has been proven guilty. He argues that these questions could have led jurors to believe that the presumption of innocence is gone once the State has presented all of its evidence. He further notes that in questioning prospective jurors on the presumption of innocence, none of the attorneys on either side specifically reminded them that the presumption remains with the defendant during deliberations.

¶ 106 The defendant argues that the potential for confusion was not cured by the court because the court did not ask jurors whether they understood its explanation of the presumption of innocence, as required by Rule 431(b) (Ill. S. Ct. R. 431(b) (eff. July 1, 2012). We note that he does not raise the 431(b) violation as a basis to reverse in its own right; he argues only that it exacerbated the prejudice that resulted from the State's inaccurate definitions of the presumption of innocence.

¶ 107 The defendant argues that this problem continued during opening statements. As we mentioned earlier, both the court and defense counsel discussed the presumption of innocence. However, as the defendant points out, neither specifically mentioned the fact that the presumption of innocence continues until the jury has reached a verdict.

¶ 108 Contrary to the defendant's contention, the comments we have discussed so far were, at most, incomplete. The defendant, however, points out that during the State's closing argument, Vucich told jurors that the defendant's presumption of innocence was "long gone" at that point—before deliberations had begun—"because he's been proven guilty beyond a reasonable doubt of first degree murder." This remark did misstate the law on the presumption of innocence by explicitly telling jurors that the presumption of innocence no longer applied. As such, it was improper. See *Brooks*, 345 Ill. App. 3d at 951. The question is whether this remark resulted in substantial prejudice to the defendant. We conclude that under the facts of this case, it did not.

¶ 109 We reiterate that, as the defendant acknowledges, the court gave prospective jurors a correct and complete explanation of the presumption of innocence at the beginning of *voir dire*. As the defendant likewise acknowledges, the court also gave jurors a complete explanation of the presumption of innocence during jury instructions. The court instructed jurors that the presumption "remains with him at every stage of the trial *and during your deliberations on the verdict*." (Emphasis added.) As we explained previously, proper jury instructions are often sufficient to cure errors. See *id*. at 950. Here, the court properly instructed jurors on the presumption of innocence both before and after they heard from the attorneys. We believe this was sufficient to cure the error.

¶ 110 It is also worth reiterating that the defendant conceded that the State had proven everything it was required to prove in this case. As such, the only issue for the jury to determine was whether the defendant actually subjectively believed that his use of deadly force was justified by self-defense at the time. As we explained earlier, the defendant

bore the burden of proof on this question. 720 ILCS 5/9-2(c) (West 2012). Under these unique facts, any prejudice from possible confusion concerning the presumption of innocence was greatly mitigated.

¶ 111 E. Statements on Propensity

¶ 112 We now turn our attention to the defendant's contention that the State impermissibly argued that he should be found guilty of first degree murder due to a propensity to commit the crime. He argues that this error was exacerbated by improper questioning of the defendant during cross-examination. We are not persuaded.

¶ 113 Evidence of prior criminal conduct is not admissible to prove the defendant's propensity to commit the crime. *People v. Thigpen*, 306 Ill. App. 3d 29, 36 (1999). However, such evidence is admissible if it is relevant for any other purpose. *People v. Dabbs*, 239 Ill. 2d 277, 283 (2010). If admitted, evidence of other crimes must not become a focal point of the trial. *People v. Boyd*, 366 Ill. App. 3d 84, 94 (2006). Thus, it should not be emphasized during closing arguments, particularly not in a manner that suggests that the defendant has the propensity to commit crime. See *Thigpen*, 306 Ill. App. 3d at 38-39. In this case, evidence of the defendant's prior conviction was admissible because it was relevant to his credibility as a witness. *People v. Flowers*, 306 Ill. App. 3d 259, 264 (1999). The court provided a limiting instruction, telling jurors that they were to consider evidence of the conviction only for that purpose.

¶ 114 The defendant does not contend that evidence of his conviction was admitted in error. He argues, however, that the State improperly focused jurors' attention on it. We note that in closing argument, prosecutor Vucich never explicitly urged jurors to find the

defendant guilty because his prior murder conviction showed that he was likely to commit murder. However, she did make a few comments that at least implicitly suggested that they do so. She first told jurors that the crime scene photographs they saw showed "the work of a cold-blooded murderer." Standing alone, that is a proper argument based on the evidence. However, Vucich then said, "And you heard that's what he is," an apparent reference to the defendant's prior conviction. Similarly, after discussing the defendant's testimony that he told an employee of the ankle monitor company that he was "out enjoying his life" when the murder took place, Vucich said, "That's how this one enjoys his life. He murders people." This, too, served as a subtle reminder that the defendant had a prior murder conviction. Finally, during rebuttal argument, Vucich described the case as being about "a convicted murderer" who beat the victim 28 times and dumped him into a lake. Earlier, we set out these remarks in the context of the State's closing argument as a whole. The remarks were improper, but we do not believe they created a pervasive theme.

¶ 115 The defendant, however, also points to improper questioning during cross-examination. The defendant was asked how long he was free before he "murdered someone else" and whether the first person he murdered was also a stranger. The court sustained an objection to the second question and instructed jurors that the statements of attorneys are not evidence. The defendant argues that this was not enough to cure the prejudice. We disagree. Although we find these questions and the remarks we have just discussed to be improper and we do not condone them, we also do not believe they

amount to a pervasive pattern that was likely to focus jurors' attention on the defendant's propensity to commit murder rather than the issues at hand.

¶ 116 F. Plain Error and Cumulative Error

¶ 117 Finally, we must consider whether we should relax the forfeiture rule. As stated earlier, the plain error rule allows us to consider claims that have been forfeited in cases where (1) the evidence is closely balance or (2) the error is serious. *Herron*, 215 Ill. 2d 167, 186-87. To consider claims under the first prong of this test, we must ask whether the evidence is so close that the errors alone severely threatened to "tip the scales of justice" against the defendant. *People v. Sebby*, 2017 IL 119445, ¶ 51. To consider claims under the second prong, we ask whether any of the errors were so serious that they undermined the fairness of the defendant's trial or the integrity of the judicial process. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). We do not find reversal warranted under either prong.

¶ 118 The evidence in this case was not closely balanced. As we have discussed at length, the only question for jurors in this case was whether the defendant had proved by a preponderance of the evidence that he believed that his actions were justified by the need to act in self-defense at the time he killed Dakota Jones. We believe the evidence overwhelmingly supported the jury's finding that he did not meet this burden.

¶ 119 Although imperfect self-defense is often couched in terms of an honest-but-unreasonable belief in the need to act in self-defense, what the defendant must actually show is that he believed circumstances were present that would have justified the killing if they had actually been present. 720 ILCS 5/9-2(a)(2) (West 2012). A homicide is

legally justified as self-defense if (1) the defendant was threatened with force; (2) the defendant was not the initial aggressor; (3) the danger of harm is imminent; (4) the threatened force is not lawful; (5) the defendant subjectively believed the danger required the force that was used in response to it; and (6) the defendant's belief was objectively reasonable. *Jeffries*, 164 Ill. 2d at 127-28. The fifth element is negated if the force used by the defendant is more than the amount of force necessary to avert the danger. *People v. Anderson*, 234 Ill. App. 3d 899, 906 (1992). Overwhelming evidence showed that the defendant used force that was grossly disproportionate to the threat he claimed to have believed he faced. As we have discussed, that evidence showed that Jones was struck with a hammer a total of 28 times. In addition, the evidence overwhelmingly supported the State's assertion that the defendant dropped Jones into the lake, thus ensuring that he would not survive.

¶ 120 We also find that substantial evidence showed that the defendant's claim that he subjectively believed he needed to act in self-defense at all was not credible. The defendant testified that he was able to avoid being hit by the stick Jones was allegedly swinging simply by stepping out of the way. In addition, the defendant testified that when he reached into the car to get the hammer, the car door absorbed the impact of Jones's swing. This indicates that Jones was not standing between the defendant and his vehicle. Under these circumstances, it would have been easy for the defendant to get into the vehicle, close the door, and drive away. Finally, the evidence that the defendant took evasive measures after the murder undermines the credibility of his claim that he believed

he was justified at the time. We do not find the evidence to be so closely balanced that the asserted errors were likely to have tipped the scales against the defendant.

¶ 121 We also do not find any of the claimed errors serious enough, on its own, to warrant consideration under the second prong of the plain error test. The defendant, however, urges us to consider their cumulative effect under *Blue*.

¶ 122 There, the supreme court found three particularly egregious errors. First, the State displayed the uniform of a slain police officer on a mannequin during trial. *Blue*, 189 Ill. 2d at 121. The uniform was torn as result of medical treatment the officer received, and it was stained with the officer's blood and brain matter. *Id*. at 120. The uniform remained on display in the courtroom through the testimony of multiple State witnesses. *Id*. at 121. Over the defendant's objection, the uniform was admitted into evidence and sent to the jury room during deliberations. Jurors were even provided with rubber gloves to allow them to handle the uniform. *Id*. Second, when prosecutors made objections during the testimony of a defense witness, they "offered the jury a simultaneous rebuttal" of the witness's account instead of simply stating the evidentiary basis for their objections. *Id*. at 137. Third, during closing argument, a prosecutor urged jurors to use their verdict to "send a message" to the officer's family and to other police officers. *Id*. at 126-27. The defendant objected to the argument about sending a message to the police, but did not object to the argument about the slain officer's family and did not address either argument in a posttrial motion. *Id*. at 127. Further, the supreme court observed that prosecutors engaged in additional inappropriate conduct throughout the trial. *Id*. at 140. One of the prosecutors insinuated during cross-examination of a defense witness that defense

attorneys hid his report from them. *Id*. at 140-41. Prosecutors shouted at another defense witness and threw photographic exhibits onto a table. *Id*. at 141.

¶ 123 The State argued that, even cumulatively, these errors were harmless because the evidence against the defendant was overwhelming. *Id*. at 137-38. The supreme court agreed that the evidence was overwhelming, but found that the cumulative effect of the challenged errors "created a pervasive pattern of unfair prejudice to the defendant's case." *Id*. at 139. The court therefore concluded that the defendant did not receive a fair trial and reversal was warranted. *Id*. at 140.

¶ 124 Here, the errors we have found that occurred during trial include the State's failure to elicit testimony explaining Dr. Nanduri's conclusion that Jones was alive when he was placed in Horseshoe Lake and two questions during cross-examination of the defendant that referenced the defendant's prior murder conviction. As noted earlier, the court sustained defense counsel's objection to one of the questions. We do not find that these errors were anywhere near as pervasive or inflammatory as those that occurred in *Blue*.

¶ 125 We have also found that several remarks during the State's closing argument were improper. Of particular note were remarks inflaming the passions of jurors, reminding jurors of the defendant's prior murder conviction, and confusing the self-defense and second degree murder based on imperfect self-defense. We do not believe these remarks rise to the level of the errors at issue in *Blue*. Even viewing the challenged remarks cumulatively, we do not believe they played a role in the jury's decision, and we do not find them to be so egregious that they threatened the integrity of the judicial process or

undermined the defendant's right to a fair trial. Thus, we decline to reverse on the basis of cumulative error.

¶ 126 III. CONCLUSION

¶ 127 For the foregoing reasons, we affirm the defendant's conviction.

¶ 128 Affirmed.