SIXTH DIVISION
JUNE 8, 2018

No. 1-15-2319

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 09 CR 10642
	)	
JOSHUA ENRIQUEZ,	)	Honorable
	)	Neera Walsh and
Defendant-Appellant.	)	Joseph M. Claps,
	)	Judges Presiding.

JUSTICE CUNNINGHAM delivered the judgment of the court.
Justices Connors and Delort concurred in the judgment.

ORDER

¶ 1 *Held*: The defendant-appellant's first degree murder conviction is affirmed. The trial court did not abuse its discretion in declining to instruct the jury regarding reckless homicide, or in declining defense counsel's request to question prospective jurors regarding domestic violence. The prosecutor's comments did not result in substantial prejudice or constitute a material factor in the conviction.

¶ 2 A jury found defendant-appellant guilty of two counts of first degree murder and two counts of aggravated battery. The trial court sentenced him to natural life in prison for the murder convictions, as well as concurrent extended-term 10-year sentences for the aggravated battery convictions. On appeal, the defendant contends that he is entitled to a new trial because:

(1) the trial court declined to instruct the jury on the lesser offense of reckless homicide; (2) the trial court declined his request for *voir dire* questions on the subject of domestic violence; and (3) he was prejudiced by prosecutorial misconduct. For the following reasons, we affirm the judgment of the circuit court of Cook County.

¶ 3 BACKGROUND

¶ 4 On the morning of May 3, 2009, the defendant's Jeep Cherokee SUV (the SUV) struck a car containing four people: Gabriella Almanza, Nicole Mijares, Maria Ortega, and Karina Paredes. Paredes was an ex-girlfriend of the defendant. Almanza and Mijares were killed in the incident, and Ortega and Paredes were injured.

¶ 5 The defendant was charged in an 11-count indictment, including four counts of murder, two counts of attempted first degree murder, and five counts of aggravated battery. The State proceeded to trial on counts one through four (first degree murder) and counts 8 and 9 (aggravated battery).

¶ 6 Prior to trial, the State filed a motion to admit "proof of other crimes," including alleged incidents of past violence by the defendant against Paredes. The trial court granted that motion in part, ruling that evidence of three incidents were admissible to show the defendant's state of mind, motive, and intent.

¶ 7 During jury selection, defense counsel requested that the court[1] advise potential jurors that the case "involves domestic violence" and to ask them if that would affect their "ability to be fair and impartial in this case." The State objected, arguing that it was sufficient to ask "general questions" as to whether prospective jurors "have been victims, if they have family members who are victims of crimes." The court agreed with the State and declined the defense request.

[1] Judge Neera Walsh presided over jury selection. Judge Joseph M. Claps presided over the other proceedings discussed herein, including the defendant's trial.

¶ 8 At trial, the State called Shema Harris to testify. In the early morning hours of May 3, 2009, Harris was driving home, following the end of her shift as a CTA bus operator. She was driving south on Kedzie Avenue when she saw a "little dark car" behind her, and an SUV behind the car. She recalled the SUV was "speeding" and "zigzagging across the road," "going from lane to lane." Harris "looked back in the mirror, and I saw the truck hit the car, and the car flipped and rammed up into the park." She saw that the SUV "flipped over." Harris pulled over and dialed 911. On cross-examination, Harris acknowledged that she heard the crash before she looked back, and so she did not actually see the SUV hit the car.

¶ 9 The State called Brittany Berman. On the night of the incident, she was staying with friends who lived in a second floor apartment at 1010 North Kedzie Avenue, across from Humboldt Park. She was sleeping on the couch near a window when she was awakened by "an extremely loud, unbelievably long crash." She went to the window and saw an SUV "on its roof, and it was rocking as if it had just landed." She told her friend to call 911. She then went onto the balcony and saw a man, whom she identified as the defendant, emerge from the driver's side of the SUV and stand up. She asked him "if he was okay" but he did not respond at first. She saw him start to "pace a little bit." After she asked a second time if he was okay, the defendant responded "yeah." She asked the defendant if there was anyone else in the vehicle, and he said "no."

¶ 10 Berman looked across the street into the park and saw "the other car that had hit the tree." The car was "smoking" and "completely crushed." When she looked back toward the street, she no longer saw the defendant. She subsequently identified the defendant in a police lineup.

¶ 11 The State then called Megan Lorang, who lived at 1010 North Kedzie in May 2009. She testified that Berman slept at her apartment on the night of the incident. Lorang recalled hearing

a loud crash and Berman screaming. After speaking to Berman, she went on the balcony and "saw an SUV turned over in front of the apartment" that was "completely upside down." Lorang "saw a man outside the SUV walking around," whom she identified as the defendant, as well as "several smashed cars along the road." Across the street, in the park, she saw "another car smashed against a tree." She recalled the defendant "looked a little disoriented" and was "walking around the car."

¶ 12 Detective Michael Moreth testified that he spoke with Berman and Lorang on the morning following the collision. He testified that Berman and Lorang separately identified the defendant when shown a photo array.

¶ 13 Chris Garcia, who lived at 1138 North Kedzie, testified that he woke up at approximately 5:45 a.m. on the date of the incident to let his dog outside. As he was standing in his hallway, he saw two vehicles pass, a small car and an SUV. The vehicles were close, "bumper to fender." He recalled that he "saw two vehicles together. I saw smoke and it smelled like rubber." After the vehicles passed, he heard a crash.

¶ 14 Elsewhere during the State's case, the parties stipulated to the admission of an audio recording of a call to the Chicago Office of Emergency Management and Communications at 5:56 a.m. on May 3, 2009. In that recording, a caller (later identified as the defendant) stated "I'd like to report my car stolen" and described the stolen vehicle as a Jeep Cherokee. Asked when the theft happened, the defendant responded "ten minutes ago." Asked for his name, the defendant identified himself as "Jose Soto."

¶ 15 Lawrence Odoms of the Chicago Police Department testified that, on May 8, 2009, he and other officers apprehended the defendant in an apartment building. Odoms testified that the defendant was found "in the back bedroom in a closet."

¶ 16 Detective Wayne Rashke testified that he investigated the scene of the collision on the morning of May 3, 2009. He described the relative positions of the vehicles at the scene, as well as skid marks. Detective Rashke confirmed that the People's Exhibits 17 through 44 were photographs taken of the scene. He described the photographs, which showed that the defendant's SUV was on its roof and that the smaller car, a black Pontiac, had traveled into the park and struck two trees. The passenger's side of the car was severely damaged, and the vehicle's airbags had deployed.

¶ 17 The State called Maria Ortega. Ortega testified that on the evening of May 2, 2009, she drove her car, a Pontiac Grand Am, to her job at a bar called Ocha's on the south side of Chicago. Ortega also drove her sister, Gabriella Almanza, Nicole Mijares, and Karina Paredes. Ortega dropped off Almanza and Paredes at a separate bar, before she and Mijares proceeded to Ocha's. Ortega finished work at about 3:00 a.m. on May 3, 2009. Ortega and Mijares then picked up Almanza and Paredes; together they drove to a friend's house, where they stayed for about an hour.

¶ 18 The four friends then drove toward the Humboldt Park area. Ortega recalled that they wanted to smoke marijuana. They stopped at a Citgo gas station on the corner of Kedzie Avenue and North Avenue, in order to buy a "cigar" in which they intended to "place the marijuana to smoke it from." Ortega exited her car. She recalled that "[w]hen I walked up to the window to purchase the cigar, I noticed that [the defendant's] truck pulled in the gas station." Ortega stated that she knew the defendant "from the neighborhood that we grew up on" and knew that he was Paredes' ex-boyfriend. Ortega saw that the defendant's current girlfriend was with him, in the passenger's seat of the defendant's vehicle.

¶ 19 Ortega was shown an excerpt of video footage from May 3, 2009, from a surveillance camera mounted at the gas station. Ortega agreed that the video showed her exiting her car at 11 seconds, and that the defendant's vehicle pulled into the station's lot at 23 seconds.

¶ 20 Ortega testified that, after she left the gas station, she and her friends drove to another location, where she purchased marijuana. A short time later, Ortega was driving north on Albany Avenue, a one-way street, when she saw the defendant's vehicle "double-parked" in the street, and the defendant was standing next to his SUV. She saw the defendant's girlfriend "on the sidewalk." Ortega testified that she "slowed down and I drove around" the defendant and his vehicle. She then looked in her rearview mirror and saw the defendant get into his vehicle. Ortega turned west onto Bloomingdale Avenue, and then turned south onto Kedzie. The defendant followed her.

¶ 21 As her car approached the intersection of Kedzie and North Avenue, her car was hit from behind by the defendant's SUV; Ortega recalled there was "a hard impact and we jolted a bit forward." As Ortega continued to drive south on Kedzie, the defendant's SUV "came again and it pushed my car through the red light on North Avenue." Ortega noticed "some rattling in the back" of her car. She recalled that she was "trying to accelerate" but her car did not respond. She testified that the defendant "kept hitting my car" from behind. Asked how many times, she answered "more than four."

¶ 22 Ortega recalled that her "car started to smoke and I started to think before I would hit another intersection light that I would try to get away from him." She "turned my steering wheel to the left to try to turn in the park entrance." Ortega's next memory was waking up in the hospital. Describing her injuries, Ortega testified she had "50-something stitches on the left side of my face," received a cast on her twisted left ankle, and had surgery on her right foot.

¶ 23 On cross-examination, Ortega agreed that, at the gas station, the defendant "didn't roll down the window or anything." She agreed that, just before the collision, she attempted to make a sharp left turn into a street that turns into Humboldt Park.

¶ 24 The parties stipulated that, if called to testify, Adrienne Segovia would state that she was a Deputy Medical Examiner of the Cook County Medical Examiner's Office, and that she performed autopsies on Mijares and Almanza. Both women suffered numerous external and internal injuries. Segovia opined that the cause of death for both women was "multiple injuries due to a vehicle striking an automobile" and that the manner of death was homicide.

¶ 25 Following Segovia, the State called Paredes. Paredes testified that she began dating the defendant in the summer of 2007. She stated that after several months in the relationship, "he started getting more jealous and controlling." Paredes described an incident on the evening of February 9, 2008 when she and the defendant were at a friend's house. She testified that "I didn't want to stay there, so I told him I was leaving." She recalled that: "As soon as I go open the door, [the defendant] shot me" in the shoulder. The defendant took her to a hospital but told her not to tell anyone that he shot her. She did not report the incident because she "didn't want him to get incarcerated."

¶ 26 Paredes also described an incident on July 4, 2008, when she and the defendant were arguing. During the argument, the defendant reached into his pocket, retrieved a pocket knife, and stabbed her in the leg. She testified that she did not tell anyone about that incident because she was "scared" and "embarrassed." Paredes also recalled an incident in November 2008, when the defendant took her to the basement of an abandoned building and "told me that he wanted to work things out." Paredes "kept telling him that I didn't want to work things out." She recalled that the defendant began "choking me for a while" so that she "couldn't breathe." In order to get

him to stop choking her, she told him that they could "work things out." Paredes stated that she ended their relationship shortly after that incident.

¶ 27 Paredes further testified that, on the evening of May 2, 2009, she was working at a bar with her friend, Almanza. Ortega, who was Almanza's sister, drove Paredes and Almanza to work. Paredes' shift ended at 3 a.m. on May 3, 2009. Ortega then drove Paredes, Almanza, and Mijares to a friend's house, where they stayed for "an hour or two." Ortega then drove the four women towards Ortega's home in the Humboldt Park area.

¶ 28 Paredes recalled that they stopped at a Citgo gas station to buy a "cigarillo" to "load up some weed." Ortega exited the car at the gas station, while the three other women remained in the car. Paredes then saw the defendant drive into the gas station. The defendant's girlfriend was in the passenger's seat. Paredes recalled that the defendant "looked into [Ortega's] car" after which he "kept driving" and left the gas station. Ortega returned to the car, and the four women drove to a house where they purchased marijuana. The four women planned "to go back to [Ortega's] house."

¶ 29 As Ortega drove on Albany Avenue, Paredes saw the defendant "in the middle of the street." Paredes testified that Ortega drove around the defendant without speaking to him. After Ortega's car passed, Paredes looked back and saw the defendant getting into his vehicle. She recalled that "when I looked back again *** he is already speeding up so that I told [Ortega] to drive faster." Paredes recalled that, as Ortega was driving on Kedzie Avenue, the defendant's "truck hit our rear end." She testified that "the impact was hard" and Ortega's car "started smoking." Paredes stated that "it sounded like the wheel was going to come off."

¶ 30 Paredes testified that the defendant "kept hitting us from the back," striking Ortega's car "over five times." Asked about the last time Ortega's car was hit, Paredes said "I just remember

bracing myself and that was it." The next thing she remembered was waking up at the hospital. Paredes suffered a fractured pelvis, wrist and arm.

¶ 31 Paredes also testified that she recognized the defendant's voice in the recording of the 911 call in which he reported a stolen vehicle.

¶ 32 On cross-examination, Paredes acknowledged that after the February 2008 incident, she told the hospital that she was shot in a drive-by shooting. She agreed she did not make a police report for either the July 2008 stabbing incident or the November 2008 choking incident. Paredes also acknowledged that she had an argument with the defendant's girlfriend "a couple weeks before" the May 3, 2009 collision.

¶ 33 After the State rested, the defendant testified. He acknowledged that he and Paredes began dating in the spring of 2007. He testified that their relationship was "kind of rocky" because he "did a lot of cheating," which upset Paredes. However, the defendant denied that he ever hit, shot, or stabbed Paredes.

¶ 34 As of May 3, 2009, the defendant had another girlfriend, Monique. According to the defendant, Paredes was not happy about his relationship with Monique. He testified that he "was still messing around with" Paredes after he began dating Monique. He stated that he had sex with Paredes in December 2008, and "around January" Paredes told him that she was pregnant. The defendant stated that Paredes did not have the baby. Asked if he tried to "work things out" with Paredes after she became pregnant, the defendant said that he told Paredes that it was not a "good idea for us to get back together" because of his relationship with Monique. The defendant testified that Paredes "kind of got mad at the fact that I didn't want to get back with her."

¶ 35 The defendant recalled that, on the evening of May 2, 2009, he was with Monique and several of her friends drinking alcohol. Asked how much he drank, the defendant said he "lost

count at like the second fifth" of alcohol. The group began at a bar, and then continued drinking in a park. After leaving the park, they "rode around most of the night, talking."

¶ 36 In the early hours of May 3, 2009, the defendant drove to the Citgo gas station "[t]o get Monique something to drink." He did not go into the store, however, because he saw Paredes and Ortega. He stated that he "knew there was going to be problems" if he went into the store, and was concerned about "Monique and the girls having a fight." The defendant testified that "[a]s soon as I pulled in, I pulled right back out" of the gas station.

¶ 37 He then drove to Albany Avenue, where Monique's car was parked. There, he exited his vehicle to retrieve a "hoodie" that he had left in her car. He "start[ed] having a conversation with Monique." As they talked, he noticed that Monique looked "pas[t] my shoulder," after which he turned and saw Ortega's car approaching. He stated: "As I was trying to get into my car, [Ortega] hit me on the side of my -- well on the back of my body." Asked to clarify, he said that Ortega "passed by me and hit me" with her car.

¶ 38 The defendant then "jumped in [his] car and tried to follow them." He did so "[b]ecause I wanted to know why she hit me," as he felt "upset and confused" that she struck him. He followed Ortega's car when it turned on Bloomingdale Avenue. He recalled that, as he made the turn, "I took my eyes off the road for a split second to pick up my phone on the floor" and "[b]y the time I looked up, I hit her on the back of the car."

¶ 39 He then recalled that Ortega "pushed on the gas and turned [south] on Kedzie, so I just continued to follow her." He recalled that "[s]moke was coming from the back of her car" and he "continued to chase her to try to stop her." He maintained that he did so "because I wanted to know why she hit me." The defendant admitted that he "bumped her again" near the intersection of Kedzie and Wabansia Avenue. When his counsel asked why, he answered "I don't know."

He then stated "I remember bumping her again" near the intersection of Kedzie and North Avenue.

¶ 40 The defendant further testified that "I switched to the opposite lane trying to get her attention." He stated that he tried to beep his horn "but my horn wasn't working." He "was trying to get on the side of her" but "[s]he kept on speeding up." He acknowledged that he was "going the wrong way" when he switched lanes. He "continued trying to chase her" down Kedzie Avenue, recalling that "she kept on switching lanes" and "wouldn't let me get on the side of her."

¶ 41 He stated that he was "trying to get her attention to pull over" when he "noticed that cars [were] coming down Division [Street.]" At that point he "let go of the gas and tried to pump my leg on the brake to slow down." He saw Ortega go through a red light, and he "[s]tepped on the gas to try to catch up back to her." He again "came up on the side of her" and Ortega's car "jumped in front of me." He testified: "I think she was trying to get into the little side street right there to the park." The defendant stated that he "tried to jump out her way to get into the next lane, but by that time it was already too late." His vehicle "came in contact with the car" and he "flipp[ed] in the air."

¶ 42 The defendant "woke up hanging upside down" in his vehicle. He crawled out of his vehicle and felt "dazed." He stated that he did not see Ortega's car. At the conclusion of his direct examination, his counsel asked: "Did you mean to hurt, kill those girls?" The defendant answered: "No."

¶ 43 On cross-examination, the prosecutor asked: "You didn't have any trouble controlling that car from all this drinking that you were doing, did you?" He answered: "No, sir." The prosecutor showed the defendant the gas station surveillance video, leading to the following

exchange:

"Q. Who is that girl dancing out of the car?

A. Maria.

Q. You see a conversation that you were talking about between Maria and Karina?

A. No.

Q. You don't see it? Right?

A. No, I don't know.

Q. Did it happen?

A. Not that I know of.

Q. Didn't you just testify that that's what you saw the two of them talking?

[Defense Attorney]: Objection.

THE COURT: Objection overruled. What's the answer?

THE WITNESS: No, sir.

THE COURT: Okay.

Q. No sir, what?

A. I didn't see them talking.

Q. Didn't you just testify that you saw them talking?

A. No, I didn't.

Q. What did you tell us about Maria and Karina in that gas station?

A. I said I just pulled in and I pulled right back out because

I didn't want no problems."

¶ 44 The defendant acknowledged that, shortly after the collision, he made the 911 call in which he stated his name was "Jose Soto." Asked why he did so, he answered: "I don't know. When I made that 911 tape, I was scared of getting locked up."

¶ 45 The defendant acknowledged that he did not ask for help for the women in Ortega's car. He testified that he "thought they got away" and did not see their car after the collision. When the prosecutor asked why he left the scene, the defendant answered: "I just finished hitting those parked cars. I was drunk. I didn't have no license. Just a quick reaction I guess."

¶ 46 When asked "how many times did you strike the back of that vehicle," he testified: "I'd say I strike once, bump about two, three" times. He maintained that he did so "to get her attention" to "pull over" to talk to him. He stated that, at one point he "made eye contact" with Almanza and her "body language was telling me she is reaching over to Maria [Ortega] and *** telling her to pull over." The defendant admitted that he pursued Ortega's car for over a mile before the collision.

¶ 47 The defendant acknowledged that Monique and Paredes had an argument a couple weeks before the May 3, 2009 incident, but that it had "nothing to do with me." The defendant agreed that Paredes was shot while they were dating. He recalled that when he asked her what happened, she indicated she was shot "at a party." He denied that Paredes ended their relationship. After the defendant's testimony, the defense rested.

¶ 48 The following day, the court reviewed its rulings from an "informal jury instruction conference" the previous evening. Among those rulings, the court denied the defendant's request to instruct the jury on reckless homicide. Thus, with respect to the deaths of Almanza and Mijares, the jury was presented with verdict forms for first degree murder, but not any lesser

included offense. With respect to Ortega and Paredes, the jury received verdict forms for aggravated battery.

¶ 49 During closing argument, the State urged that the evidence, including the defendant's prior acts of violence against Paredes, showed that the defendant acted purposefully in causing the fatal collision. Defense counsel argued to the jury that the defendant was intoxicated and "wasn't thinking clearly" at the time of the incident, but that he had no intent to hurt or kill anyone when he "bumped" Ortega's car.

¶ 50 In its rebuttal, the State argued:

> "Was he drunk? Who cares? First of all, he's not because if you look at that video when he's driving out of there. He's not. If you listen to his voice when he's lying, he's not. It's just another excuse. Another excuse that they've come up with."

Elsewhere during rebuttal, the prosecutor stated: "Look at the Citgo [gas station] video and remember where is Maria and Karina would be having this conversation that he tells you about. It's not happening. It's another lie." The prosecutor then argued that the defendant's testimony contained "other lies," including his claim that "he's trying to get [Ortega's] attention by bumping the car," and that he initially hit Ortega's car because he was distracted by his phone.

¶ 51 The prosecutor concluded the rebuttal argument as follows:

> "[L]et's go back one final time to May 3rd of 2009. It's five minutes before dawn in Humboldt Park. A carload of innocent girls is rolling past him and he makes a decision. If he does nothing, those girls are alive and we're not even here. But not him. He makes a decision that drips with blood, that scars people for

> life, that visits pain and sorrow on family members, that leaves survivors wondering why this happened. Well, he made that decision and now it's time for you to make your decision. It's now dawn in Humboldt Park and next to a tree there's a car and it's smoking and it's demolished. Moments ago it contained the screams of four girls. And now it's completely silent. You write a final chapter to the lives of these two girls and you entitle it Justice. Find this man guilty."

¶ 52 The jury found the defendant guilty of two counts of first degree murder and two counts of aggravated battery. The trial court entered judgment on the verdicts.

¶ 53 After trial, the defendant submitted a *pro se* "motion for ineffective assistance of counsel." The trial court subsequently appointed a new attorney for the defendant.

¶ 54 The defendant's posttrial counsel filed a motion for new trial. Following numerous continuances, the motion for new trial was argued on November 5, 2014 and was denied on December 8, 2014. The defendant's motion to reconsider was denied on April 8, 2015.

¶ 55 The defendant was sentenced on June 16, 2015. For the first degree murder counts, the court sentenced the defendant to natural life. For the two aggravated battery counts, the court imposed two concurrent 10-year extended-term sentences. The defendant's motion to reconsider the sentence was denied on July 14, 2015. On the same date, the defendant filed a notice of appeal.

¶ 56 ANALYSIS

¶ 57 On appeal, the defendant asserts three independent bases for reversal and a new trial: (1) that the court erred in refusing to instruct the jury on the lesser offense of reckless homicide; (2)

the trial court abused its discretion by declining to question prospective jurors regarding domestic violence; and (3) the prosecution's misconduct in cross-examination and closing argument denied him a fair trial.[2]

¶ 58 We first address his claim that the court erred in failing to instruct the jury on reckless homicide. He urges that he was entitled to the instruction because he presented some evidence that he acted recklessly, rather than knowingly or intentionally, in performing the acts that led to the deaths of Mijares and Almanza.

¶ 59 Our supreme court has held "that the appropriate standard of determining whether a defendant is entitled to a jury instruction on a lesser-included offense is whether there is *some evidence* in the record that, if believed by the jury, will reduce the crime charged to a lesser offense, not whether there is *some credible* evidence." (Emphases in original.) *People v. McDonald*, 2016 IL 118882, ¶ 25. However, this does *not* mean that we apply *de novo* review. Rather, "[W]hen the trial court, after reviewing all the evidence, determines that there is insufficient evidence to justify the giving of a jury instruction, the proper standard of review of that decision is an abuse of discretion." *Id.* ¶ 42. As explained by our supreme court:

> "[F]or a reviewing court to determine whether the trial court abused its discretion, it must undertake a review of the relevant evidence. This is necessary because an abuse of discretion occurs where the trial court's decision is arbitrary, fanciful, or unreasonable to the degree that no reasonable person would agree

[2]The defendant's appellate brief also urged that the extended-term sentences imposed on the aggravated battery counts should be reduced to non-extended terms. However, his reply brief concedes that "The State correctly argues that extended-term sentences on the 'next most serious offense' are proper when the defendant was sentenced to nature life." See *People v. Terry*, 183 Ill. 2d 298 (1998); *People v. Calderon*, 393 Ill. App. 3d 1 (1st Dist. 2009). Thus, his reply brief explicitly "withdraws this issue."

> with it. [Citations.] The question is not whether the reviewing court would have made the same decision if it were acting as the lower tribunal." *Id.* ¶ 32.

¶ 60 We thus consider whether the trial court abused its discretion in declining to instruct the jury on reckless homicide, in addition to first degree murder. Our court has explained that "[t]he primary distinction between first degree murder and reckless homicide is the mental state of the defendant. [Citation.] Under section 9-1(a)(2) of the Criminal Code of 1961, a defendant commits first degree murder when he kills an individual without lawful justification and 'knows that such acts create a strong probability of death or great bodily harm to that individual or another.' [Citation.] It is not necessary that defendant intended to kill or that he was certain that someone would die as a result of his actions. [Citation.]" *People v. Eubanks*, 2017 IL App (1st) 142837, ¶ 34. In other words, "[a] person who knows, *i.e.*, is consciously aware, that his acts create a strong probability of death to another" is guilty of murder, even if death was not "his conscious objective or purpose." (Internal quotation marks omitted.) *Id.*

¶ 61 "On the other hand, a defendant commits reckless homicide when he unintentionally kills an individual through use of a motor vehicle and his actions 'are likely to cause death or great bodily harm to some individual, and he performs them recklessly.' 720 ILCS 5/9-3 (West 2008). A person acts recklessly when 'he consciously disregards a substantial and unjustifiable risk *** and such disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.' 720 ILCS 5/4-6 (West 2008)." *Id.*

¶ 62 In *Eubanks*, we found "sufficient evidence of [the defendant's] recklessness to instruct the jury on reckless homicide" where he "fled from police at a high rate of speed" and did not

"attempt to slow down before the fatal collision." *Id.* ¶ 37. Thus, the trial court "erred in denying [defendant's] request for an instruction on reckless homicide." *Id.* ¶ 38.

¶ 63 In *People v. McDonald*, 2016 IL 118882, our supreme court conducted a similar inquiry to decide whether evidence of recklessness required an instruction on the lesser offense of involuntary manslaughter, which occurs when a person unintentionally but "recklessly" performs the acts causing another's death. 720 ILCS 5/9-3(a) (West 2014). The *McDonald* defendant stabbed the victim (his boyfriend) in the face during an argument, damaging the carotid artery and leading to a fatal stroke. *McDonald*, 2016 IL 118882, ¶¶ 3-7. Two of the State's witnesses testified that, earlier on the date of the stabbing, the defendant made threatening statements about the victim while holding a knife. *Id.* ¶¶ 6, 9. One of those witnesses testified that she heard the argument leading to the stabbing, and she acknowledged her earlier testimony that the victim may have hit the defendant. *Id.* ¶ 7. Another witness testified that, immediately after the stabbing, he saw the defendant on top of the victim saying " 'please don't die.' " *Id.* ¶ 10.

¶ 64 On appeal from his murder conviction, the *McDonald* defendant argued that the trial court erred in declining his request for an instruction on the lesser offense of involuntary manslaughter. *Id.* ¶ 44. The *McDonald* defendant argued his case was similar to *People v. Whiters*, 146 Ill. 2d 437 (1992), which held that an involuntary manslaughter instruction should have been given when the record contained evidence of acts that "could reasonably be determined to be reckless conduct." *McDonald*, 2016 IL 118882 ¶ 54 (quoting *Whiters*, 146 Ill. 2d at 441). In *Whiters*, the defendant testified that she stabbed her boyfriend after he pushed her, ripped the phone off the wall, and threatened her, and she "screamed that she did not mean it" and called for an ambulance after the stabbing. *Id.* (quoting *Whiters*, 146 Ill. 2d at 441).

¶ 65 The *McDonald* defendant relied on the evidence that he and the victim were intoxicated, that the victim may have "instigated the argument" by punching him, that the defendant said "please don't die"; and testimony from a medical examiner that "a person who intends to cut the carotid artery would likely aim for the neck, not the face." *Id.* ¶¶ 55-56. However, our supreme court reasoned that "weighing against these factors is the evidence that defendant had cut [the victim] with a knife during an argument several months before the fatal stabbing," that the defendant made threats about the victim; the fact that defendant was armed with a knife, and that "defendant stabbed [the victim] not once but three times." *Id.* ¶ 56. Our supreme court further explained:

> "Here, defendant was trying to prevent [the victim] from leaving by keeping him from taking his bicycle. As they struggled over the bicycle, defendant swung the knife at [the victim], stabbing him three times. *** *Defendant was not merely swinging the knife recklessly in [the victim's] direction. Given the dearth of evidence of recklessness*, we conclude that the trial court did not abuse its discretion in refusing to give a jury instruction on involuntary manslaughter." (Emphasis added.) *Id.* ¶ 57.

¶ 66 We find that the reasoning from *McDonald* is applicable. As in *McDonald*, the record in this case presents ample evidence of knowing or intentional conduct, compared to a relative "dearth of evidence of recklessness." *Id.* Just as the *McDonald* defendant was "not merely swinging the knife recklessly," the evidence in this case—including much of the defendant's own testimony—makes abundantly clear that defendant was not merely driving his car recklessly; rather, he engaged in intentional conduct.

¶ 67 The defendant urges that he was merely reckless, citing his testimony that he did not mean to hurt or kill anyone and only wanted to get Ortega's attention. Regardless, the evidence of his intentional acts was overwhelming. The defendant admitted that he intentionally followed Ortega's vehicle and engaged in a "chase" that lasted over one mile. Most significantly, he admitted that he *intentionally* "bumped" his much larger SUV into Ortega's smaller car multiple times. The evidence showed that he continued to pursue and "bump" Ortega's car, even after he noticed that her car was "smoking." It is also apparent that he did so at a very high speed, given that his SUV flipped over and landed on its roof. Further, the photographs of the scene admitted into evidence (included in the record on appeal) graphically illustrate the catastrophic damage to Ortega's car, as well as the damage to parked vehicles and trees. This further corroborates the other evidence that this pursuit and ultimate demolition of Ortega's car was not a "bump" as the defendant claimed but rather a high speed intentional ramming. The pursuit of Ortega's car by the defendant extended over a mile and the culmination underscores the intensity of the defendant's actions in the pursuit. No reasonable person could fail to see that such actions were substantially certain to cause serious bodily harm or death.[3]

¶ 68 In sum, there was ample, if not overwhelming, evidence that the defendant acted knowingly or intentionally, compared with scant evidence of recklessness. Thus, we cannot say that the trial court abused its discretion when it determined that there was insufficient evidence to support a reckless homicide instruction. Therefore, we reject the defendant's first argument for reversal.

¶ 69 We turn to the defendant's claim that the trial court abused its discretion when it declined to permit *voir dire* regarding domestic violence. The defendant urges that because "the State

[3] Moreover, his actions following the incident are also consistent with a finding of the defendant's knowing or intentional mental state. He left the scene of the fatal collision, called 911 to falsely report that his vehicle was stolen, and evaded police for several days.

made domestic violence an issue," he was entitled to ask prospective jurors whether they could be fair and unbiased, given the role of that issue in this case. He argues that a juror "might not be able to fairly judge a person accused of" such violence, and that domestic violence can "generate intensely negative feelings and prejudices," even in those who have not experienced it. The defendant points out that, after hearing a description of the charged offenses in this case, one potential juror remarked: "You can stop right there. If there is any women being abused like that, I have a hard time with it." Although that juror was excused for cause, he suggests that other jurors may have had biases or prejudices that could have been revealed with more specific questioning about domestic violence. He argues that such *voir dire* questions were especially necessary since the jury heard testimony from the alleged victim of the abuse, Paredes, and were then asked to judge the credibility of the alleged perpetrator of that abuse.

¶ 70 "A criminal defendant has a constitutional right to trial by an impartial jury. [Citations.] To secure this right, inquiry is permitted during *voir dire* 'to ascertain whether the jury has any bias, opinion, or prejudice that would affect or control the fair determination by him of the issues to be tried. [Citation.] The purpose of *voir dire* is to ascertain sufficient information about prospective jurors' beliefs and opinions so as to allow removal of those members of the venire whose minds are so closed by bias and prejudice that they cannot apply the law as instructed in accordance with their oath.' [Citation.]" *People v. Encalado*, 2018 IL 122059, ¶ 24.

¶ 71 "The manner, extent, and scope of *voir dire* examination rests within the discretion of the trial court. [Citations.] However, 'the trial court must exercise its discretion in a manner consistent with the purpose of *voir dire*.' [Citation.] 'An abuse of discretion occurs when the conduct of the trial court thwarts the purpose of *voir dire* examination—namely, the selection of a jury free from bias or prejudice.' [Citation.] To be constitutionally compelled, it is not enough

that a *voir dire* question be helpful[;] rather the trial court's failure to ask the question must render the defendant's proceedings fundamentally unfair.'" *Id.* ¶ 25.

¶ 72 The defendant argues that his case is analogous to *People v. Strain*, 194 Ill. 2d 467 (2000), which upheld the reversal of a murder conviction due to the trial court's "refusal to probe for gang bias" in *voir dire.* The prosecution's theory in that case was that the defendant, a gang member, shot the victim in an attempt to retaliate against a rival gang. *Id.* at 470. During *voir dire*, the trial judge denied defense counsel's request to ask prospective jurors whether they "would find defendant less believable" due to his gang membership. *Id.* at 471-72.

¶ 73 At trial, the State presented the testimony of police officers and gang members. *Id.* at 472. Thus, "gang information permeated the testimony of almost every witness at trial" and "the outcome of the trial turned upon the credibility of defendant, various police officers, and members of the Gangster Disciples." *Id.* at 473. Concluding that the defendant was entitled to a new trial, the supreme court in *Strain* noted that "street gangs are regarded with considerable disfavor" and that other precedent from the supreme and appellate court acknowledged that "there may be strong prejudice against street gangs. [Citations.]" *Id.* at 477. Our supreme court thus held that "when testimony regarding gang membership and gang-related activity is to be an integral part of the defendant's trial, the defendant must be afforded an opportunity to question the prospective jurors *** concerning gang bias." *Id.*

¶ 74 The defendant suggests that the reasoning of *Strain* applies to this case. However, we find that this situation is more akin to that discussed in our supreme court's opinion in *People v. Encalado*, 2018 IL 122059, issued after the briefs were submitted in this appeal.

¶ 75 In *Encalado*, the defendant was charged with aggravated criminal sexual assault against Y.C. *Id.* ¶ 5. Prior to trial, the court granted the State's request to present evidence that

defendant committed sexual assaults against other persons, including C.C. *Id.* ¶ 6. Defense counsel advised the court that the defendant planned to testify that he had consensual sex with these persons in exchange for payment. *Id.* ¶ 7. Thus, defense counsel asked the court to inform prospective jurors that they would "hear evidence about prostitution" and to ask "[w]ould that fact alone prevent you from being fair to either side?" *Id.* The trial court denied the request. *Id.*

¶ 76 At trial, Y.C. and C.C. testified that the defendant sexually assaulted them in separate incidents. *Id.* ¶¶ 8-10, 14-15. The *Encalado* defendant testified that Y.C. and C.C. had consented to sex in exchange for money and drugs. *Id.* ¶¶ 17-19. On appeal from the defendant's conviction, this court held that the circuit court erred in its *voir dire* ruling, as "many persons feel strong disgust and antipathy toward the patrons of prostitutes" and "jurors may hold similar biases against customers of women who exchange sex for money." *Id.* ¶ 26 (quoting 2017 IL App (1st) 142548, ¶ 31)). Our court concluded that the defendant's *voir dire* was fundamentally unfair, requiring reversal. *Id.*

¶ 77 However, our supreme court disagreed and reversed. Our supreme court reasoned that the "relevant question" was "not whether prostitution evokes 'strong responses' in the minds of the public" but "whether prospective jurors harbor such bias against those people who patronize prostitutes that the jurors will not believe the testimony of such a person or be able to give that person a fair hearing." *Id.* ¶ 27. Distinguishing *Strain*, the *Encalado* court explained: "The *voir dire* questions in *Strain* were not required *** simply because gang membership provokes strong feelings in the public" but were required "because the public views the testimony of gang members with skepticism and may, therefore, fail to consider the testimony of a gang member without prejudice. And, importantly, this fact was established by a substantial body of case law." *Id.* ¶ 30.

¶ 78 The *Encalado* court also noted that *Strain* was distinguishable because "the gang affiliation of the witnesses was a matter that was both inescapably a part of the trial and a matter that was not in dispute by either party" *Id.* ¶ 32. In contrast, in *Encalado*, it was disputed whether the alleged victims were prostitutes, and so "defendant's proffered question did not involve a matter that was indisputably true and inextricably a part of trial." *Id.* ¶ 33.

¶ 79 We conclude that the *voir dire* issue raised this case is more akin to *Encalado* than *Strain.* The evidence of domestic violence was not an inextricable aspect of the trial, as was gang membership in *Strain*. The State's case did not hinge on whether the defendant committed prior acts of violence against Paredes. Rather, the central issue was the defendant's mental state immediately preceding the collision. Moreover, the defendant specifically denied any prior incidents of domestic violence. Thus, the requested *voir dire* questions "did not involve a matter that was indisputably true and inextricably a part of trial" but concerned "a disputed question of fact." *Id.* Accordingly, we cannot say that the trial court's ruling "rendered the *voir dire* proceeding fundamentally unfair" or constituted an abuse of discretion. *Id.* ¶ 35.

¶ 80 We turn to the defendant's third argument for reversal, in which he claims that several instances of prosecutorial misconduct denied him a fair trial. First, he points out that the prosecution misstated his trial testimony when it suggested, during his cross-examination, that he claimed to have witnessed a "conversation" between Ortega and Paredes at the gas station. He notes that the State further referenced that misstatement to attack his credibility in rebuttal argument. In addition, he claims that the prosecution suggested to the jury that he "fabricated" the claim that he was intoxicated. In support of this assertion, he points to the prosecutor's rebuttal argument that this was "Another excuse that they've come up with." He claims he suffered prejudice because this remark suggested that the jurors should not believe any of the

evidence or arguments presented by the defense, because they were "fictitiously invented" by his counsel. Finally, the defendant claims that the concluding remarks of the State's rebuttal argument improperly sought to arouse the passions and emotions of the jury.

¶ 81 The defendant acknowledges that he did not properly preserve his claims of prosecutorial misconduct, as his counsel did not object during closing argument and did not raise these claims in a posttrial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Nevertheless, he urges that we may address these claims under the plain error doctrine, which "bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved claims of error in specific circumstances." *People v. Thompson*, 238 Ill. 2d 598, 613 (2010). The doctrine applies when "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.'" *Id.* (quoting *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007)).

¶ 82 "The first step of plain-error review is determining whether any error occurred. [Citation]." *Id.* We thus consider whether the prosecutor's challenged comments amounted to error. We keep in mind that "[w]hile a prosecutor may not make arguments or assumptions that have no basis in evidence, even improper comments or remarks are not reversible error unless they are a material factor in the conviction or cause substantial prejudice to the accused. [Citation.]" *People v. Harris*, 2017 IL App (1st) 140777, ¶ 61 (quoting *People v. Smith*, 362 Ill. App. 3d 1062, 1085 (2005)).

¶ 83 We first address the portion of the defendant's cross-examination in which the prosecution suggested (incorrectly) that the defendant claimed to have observed a conversation

between Ortega and Paredes at the gas station. In asserting that this was prejudicial error, the defendant primarily relies on *People v. Davidson*, 235 Ill. App. 3d 605 (1992), which reversed an attempted murder prosecution. In *Davidson*, the defendant testified that the victim "attacked him the week before with a wine bottle" and claimed that he stabbed the victim out of fear after the victim approached with a bottle in his hand. *Id.* at 606. On cross-examination, the prosecutor asked the defendant if the victim had something in his hands, and the defendant answered: "Yes, he had something in his hands." *Id.* at 612. The prosecutor then asked: "You didn't tell us that earlier, did you?" *Id.* The defendant responded: "I think I did." *Id.* Our court in *Davidson* held that the defendant was "prejudiced by the placing of the prosecutor's recollection and credibility against his own." *Id.*

¶ 84 We find that *Davidson* is distinguishable. In that case, whether the victim had something in his hands was crucial to the defendant's claim that he acted out of fear. In contrast, the subject of the prosecutor's misstatement in this case was relatively insignificant. Regardless of whether the defendant claimed to have observed a "conversation" between Ortega and Paredes, it was undisputed that he saw them at the gas station, encountered them again on Albany Avenue, and then began to pursue Ortega's car. In other words, whether he observed an earlier "conversation" at the gas station was not material to his account of events. Moreover, we are not persuaded that the prosecutor's misstatement had any prejudicial effect on the jury's assessment of the defendant's credibility. Regardless of the misstatement, the jury was presented with ample evidence that contradicted the defendant's account of events, and the jury was entitled to find his explanation incredible. We cannot discern any probability that it would have believed him, but for the prosecution's misstatement on cross-examination.

¶ 85 The remaining instances of alleged prosecutorial misconduct occurred during closing argument. "A prosecutor has wide latitude in making a closing argument and is permitted to comment on the evidence and any fair, reasonable inferences it yields." *People v. Glasper*, 234 Ill. 2d 173, 204 (2009). In reviewing the prosecutor's comments, we ask whether they "engender substantial prejudice against a defendant such that it is impossible to say whether or not a verdict of guilt resulted from them. [Citation.] 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. [Citation.]" *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). "[C]losing arguments must be viewed in their entirety, and the challenged remarks must be viewed in context. [Citations.]" *Id.* at 122.

¶ 86 Viewing the case in its entirety, we cannot say that any of the challenged remarks in closing argument constituted a material factor in the conviction. First, the defendant points out that the State repeated its earlier misstatement of the defendant's testimony, when the prosecutor stated: "Look at that Citgo video and remember where is Maria and Karina would be having this conversation that he tells you about. It's not happening. It's another lie." The defendant argues he was prejudiced because the State relied on this misstatement to attack his credibility. He asserts that "if the jury believed [he] would lie about something so inconsequential as whether Ortega and Paredes were talking when he drove into Citgo, the jury would certainly not trust his testimony on the most important issue, *i.e.*, his intent."

¶ 87 We do not find that substantial prejudice resulted from this comment. We first note that the jurors were instructed that the attorneys' arguments were not evidence and that they should disregard any statement or argument made by the attorneys which was not based on the evidence. We presume that the jury follows their instructions. *Glasper*, 234 Ill. 2d at 201. Further, as

already discussed, whether the defendant witnessed a "conversation" between Ortega and Paredes was simply not material to deciding the defendant's guilt. Indeed, the defendant's brief refers to this as an "inconsequential" detail. In the context of all the evidence in the case, we cannot find that this particular misstatement was a material factor in his conviction.

¶ 88 We reach a similar conclusion with respect to the prosecutor's comment referring to the defendant's claimed intoxication as "[a]nother excuse that they've come up with." The defendant suggests that the word "*they've*" amounted to an argument that the defendant's "attorneys had fabricated this defense." He suggests this comment "made it less likely that the jury would believe" him and that it implied that all of his arguments were "fictitiously invented" by defense counsel.

¶ 89 We recognize that, "[w]hile a prosecutor may comment on the persuasiveness of the defense theory of the case *** 'it is blatantly improper to suggest that the defense is fabricated, as such accusations serve no purpose other than to prejudice the jury.' [Citation.])" *People v. Abadia*, 328 Ill. App. 3d 669, 679 (2001); see also *People v. Thompson*, 313 Ill. App. 3d 510, 514 (2000) (comments "disparaging the integrity of defense counsel and implying that the defense presented was fabricated at the direction of counsel have consistently been condemned. [Citations]"). While recognizing that the comment was inappropriate, we do not find that it compares to the sort of accusation leveled against defense counsel in concocting a defense that has been condemned by our precedent. Rather, the comment was a single instance of using the word "they" by the prosecutor, rather than "he." The remainder of the State's closing argument referred to the defendant in the singular and made no reference to his defense counsel. Further, the characterization of the defendant's testimony as an "excuse" falls within the prosecutor's discretion to comment on the persuasiveness of the defense theory of the case. *Abadia*, 328 Ill.

App. 3d at 679. In any event, we cannot say that the "excuse" comment had a material impact on the jury's assessment of the defendant's credibility.

¶ 90 We also cannot find prejudice from the prosecutor's concluding remarks, which included a plea for the jury to write the "final chapter" in the lives of the deceased victims.

We are mindful that "Closing argument must serve a purpose beyond inflaming the emotions of the jury. [Citation.] A prosecutor cannot use closing argument simply to 'inflame the passions or develop the prejudices of the jury without throwing any light upon the issues.' " *Wheeler*, 226 Ill. 2d at 128-29. Nevertheless, reversal is warranted only if the comments "engender[ed] substantial prejudice" and "constituted a material factor in a defendant's conviction. [Citation.]" *Id.* at 123.

¶ 91 We acknowledge that some of the concluding remarks risked inflaming the passions of the jury, when they referenced the "pain and sorrow" of the victims' family members. However, in the context of the overall argument, such references were brief and isolated. Rather, the bulk of the State's argument relied on the evidence of the defendant's actions. Thus, we do not find that the references to surviving family members amounted to a material factor in the defendant's conviction.

¶ 92 We also decline to find error with respect to the remarks in which the prosecutor imagined the scene of the collision. These comments were within the prosecutor's discretion to comment on the evidence or reasonable inferences from the evidence. Although we acknowledge there was no direct evidence of "screams" from Ortega's car or silence following the collision, those remarks were not unreasonable in light of the evidence, including the testimony detailing the defendant's pursuit of Ortega's car, her efforts to get away, and the ultimate demolition of the vehicle after the crash.

¶ 93 Finally, we do not find that the prosecutor's plea for jurors to "write a final chapter" and to "entitle it Justice" exceeded the bounds of permissible argument. Our court has held "the State may denounce the activities of the defendant and urge that justice be administered." *People v. Goins*, 2013 IL App (1st) 113201, ¶ 92 (holding it was not improper for prosecutor to argue that the way for the defendant and victim to "receive justice" was to return a guilty verdict); see also *People v. Trotter*, 2015 IL App (1st) 131096, ¶54 (finding it was not improper for the State to conclude its closing argument with comments to jury that "you now have the power" and that the jurors "hold in [their] hands the sword of justice").

¶ 94 In sum, we do not find that the challenged comments, individually or cumulatively, constituted reversible error. In turn, the plain error doctrine does not apply. See *People v. Harris*, 2017 IL App (1st) 140777, ¶ 67 ("As we do not find that the prosecutor's conduct constituted reversible error, we need not separately discuss, under the plain-error doctrine, whether the evidence was closely balanced, or if the error was so serious that it affected the fairness of the trial or challenge the integrity of the judicial process. [Citation.]")

¶ 95 Finally, as an alternative to plain-error review, the defendant asserts that his counsel was ineffective in failing to preserve his claims of prosecutorial misconduct. In determining whether a defendant was denied the effective assistance of counsel, we apply the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on a claim of ineffective assistance, "a defendant must show both that counsel's performance was deficient and that the deficient performance prejudiced the defendant. [Citation.] *** Because a defendant must satisfy both prongs of the *Strickland* test to prevail, the failure to establish either precludes a finding of ineffective assistance of counsel." *People v. Cherry*, 2016 IL 118728, ¶ 24.

¶ 96 As we have explained, the alleged prosecutorial misconduct was not reversible error, as the challenged comments did not cause substantial prejudice or constitute a material factor in the defendant's conviction. In turn, the defendant cannot establish that his counsel's failure to preserve his claim of prosecutorial misconduct resulted in prejudice. Accordingly, we reject his ineffective assistance of counsel claim.

¶ 97 For the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 98 Affirmed.