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FIRST DIVISION  
August 29, 2011

2011 IL App (1st) 092428-U  
No. 1-09-2428

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IN THE APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County
	)	
v.	)	No. 05 CR 13950
	)	
LEROY WILSON,	)	Honorable
	)	Angela Munari Petrone,
Defendant-Appellant.	)	Judge Presiding.

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

**ORDER**

*HELD:* (1) The trial court did not abuse its discretion by allowing into evidence defendant's past felony conviction after weighing its probative value against the danger of unfair prejudice; (2) the State's use of a cardboard cutout of a handgun as a demonstrative exhibit during defendant's cross-examination was proper; (3) the State did not improperly shift the burden of proof during defendant's cross-examination or the State's closing argument; and (4) the trial court conducted a proper inquiry before denying defendant's *pro se* post-trial motion

alleging ineffective assistance of counsel.

¶ 1 After a jury trial, defendant Leroy Wilson was convicted of first degree murder and sentenced to 60 years in prison. On appeal, he contends that: (1) the trial court failed to exercise its discretion in admitting defendant's prior conviction; (2) the State's use of a cardboard cutout of a handgun during defendant's cross-examination deprived him of a fair trial; (3) the State improperly shifted the burden of proof during defendant's cross-examination and closing argument; and (4) the trial court failed to appoint new counsel to argue defendant's post-trial motion alleging ineffective assistance of counsel and erroneously denied that motion.

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

¶ 3 I. BACKGROUND

¶ 4 Defendant was arrested and charged with first degree murder for the May 5, 2005 shooting death of the victim, Samuel Landingham.

¶ 5 At the jury trial, Walter Williams testified that he lived on the south side of Chicago and knew defendant, who lived across the street. On May 5, 2005, Williams was working on his car outside his home at approximately 12:30 p.m. It was a half-day of school at the nearby high school, and some students milled around in the vacant lot across the street. A man called Shug stood in front of defendant's house, and kids were walking up to him and looking at the snake around his neck. A group of males got together in the vacant lot like a fight was going on. Williams recognized one male as defendant's cousin, Maurice Wilson. Maurice was holding the victim by the back of his neck and walking him to the front of the lot by the sidewalk, at which point Maurice and another man tussled with the victim. Then, defendant came from the backyard of his home, which was adjacent to the vacant lot. Defendant jumped over a fence and

into the vacant lot with a gun in his hand. He approached Maurice and the victim and raised the gun. Williams was standing approximately 20-30 feet from defendant at that time.

¶ 6 Williams testified that Alberta Wilson, defendant's aunt, pulled up in a green car. She told defendant not to shoot and pulled his arm down. Defendant raised his arm again and shot the victim, who fell to his knees and then backwards. At the time of the shooting, defendant stood two or three feet away from the victim and the gun was 10 inches away from the victim's face. Williams testified that he never saw the victim throw dirt in Maurice's face or Maurice turn his back on the victim. Only defendant had a gun, and Williams never saw defendant and the victim wrestle over that gun.

¶ 7 After the shooting, defendant ran up to his porch and was ranting about how he was not going to take this anymore. Defendant went inside his home, and Maurice told Shug to take him somewhere because defendant just shot somebody. Maurice and Shug left the area in a car. Williams went inside his house and called the police. He then went outside and walked to the lot and looked at the victim. When the police arrived, Williams was uncomfortable talking to detectives in broad daylight because he did not want any problems with the Wilson family. At the police station, Williams fully disclosed what he saw to the police.

¶ 8 Octavia Jones was a student and was walking with a group of her friends at the time of the offense. She saw Maurice and the victim walking in the vacant lot. Maurice has his arm around the victim and then the two began to fight. Two other males entered the lot from a nearby alley and joined the fight. They jumped on the victim, knocked him to the ground, and kicked and punched him. Jones saw defendant, whom she knew from school, leap over the fence from his property into the lot with a gun in his hand. He lifted the gun up for everyone to see it.

He pointed the gun at the victim, and then a woman exited a car, told defendant not to shoot and pulled his arm down. Defendant stood a couple of feet away from the victim, paused for a second and then shot the victim, who was kneeling while two males held the victim's arms outstretched on each side. Jones heard two gunshots. The victim fell backwards, and defendant said, "fuck with me now." Defendant ran into his house, and Jones ran from the area. The police interviewed her the next day at school, and she identified defendant as the shooter from the highschool yearbook.

¶ 9 Lincoln Blackton, another student, testified that he was walking from school to a store near the scene. As he approached the vacant lot, he saw the victim, defendant, and two other males in the lot. While defendant stood by the gate, two males punched, kicked and cursed the victim. The victim, who was not carrying a gun, tried to block the blows. Defendant, who was carrying a gun, walked towards the group and cursed the victim. Defendant told him that this could not go on any longer and that he was not wanted on defendant's corner anymore. Then someone yelled, "Don't shoot that boy."

¶ 10 Blackton crossed the street and continued walking past the lot. He heard two gunshots, turned back and looked into the lot. The victim fell and lay on his back. The other two males ran from the lot, and defendant went to his house and stood on the porch. Blackton then ran to a friend's home nearby. From there, Blackton saw defendant run toward a green car in the alley. The car then drove away. Blackton subsequently identified defendant as the shooter from a lineup at the police station.

¶ 11 On cross-examination, Blackton acknowledged that in his handwritten statement and before the grand jury, he never said he saw defendant with a gun before Blackton heard the

gunshots. Instead, Blackton said he saw defendant with the gun after Blackton heard the gunshots.

¶ 12 Dr. Nancy Jones, Chief Medical Examiner of Cook County, testified that the single entrance wound to the victim's head did not display evidence of close-range fire because there was no sign of stippling, which typically accompanies bullets that are fired between 18 and 24 inches from the body. Nor was there any blood spattering on the victim's hands, so his head wound was not consistent with a self-inflicted gunshot wound.

¶ 13 Defendant testified that at the time of the shooting he lived with his grandmother, two aunts and cousin Maurice. Defendant knew the victim because he came to defendant's block to buy drugs from Shug. About one week before the shooting, gunshots were fired at defendant's home; however, photographs of the home did not show any evidence of any damage from those gunshots. Defendant was not present at the time, but Maurice told him that the victim came from a gangway across the street and fired gunshots at Maurice.

¶ 14 On the day of the shooting, defendant was packing because he had plans to take the train to visit his father that day in Bloomington, Illinois. He admitted, however, that he did not have a receipt for any train ticket and could not recall the exact time the train would have departed. Defendant heard cursing coming from the vacant lot next door. He went outside and saw Maurice and the victim throw punches and fall to the ground. Defendant feared for Maurice's safety. Defendant, who had an injured knee from a gunshot wound in November 2004, walked through a gate into the lot. He did not have a gun. Maurice complained that the victim threw dirt in his face, rubbed his eyes, and began to walk away. The victim drew a gun and pointed it at Maurice's back. Defendant "rushed" the victim from the side.

¶ 15 Defendant, with both his hands, grabbed the victim's wrist and raised his arm straight up. As they wrestled for the gun, the victim fired one shot into the air. Defendant believed the victim was trying to kill him. Defendant said, "What, you bitch ass nigger trying to shoot me now?"; and the victim replied, "Yeah." Defendant continued to try to disarm the victim. Defendant pulled the victim's arm down and straight out in front of him and bent his wrist back so that the gun was pointed at the victim. While the victim still held the gun with his finger around the trigger area, defendant pulled the trigger, shooting the victim in the head. After the shooting, defendant's aunt Alberta pulled up in her car in the alley and got out. Defendant was scared, went back into his house, and hid the gun under some clothes in the basement. He never saw the gun again and never asked anybody in the house what happened to the gun.

¶ 16 Defendant did not tell the police what happened because he panicked and did not trust them. He went to an aunt's house and then left for Bloomington the next day. His father convinced him to return to Chicago and get a lawyer. Defendant was arrested about one week later at a traffic stop as he was driving with his father and brother. Defendant added that he and Williams had been in a dispute because defendant failed to pay Williams for a bet on a car race. Defendant asserted that Williams and Jones were not in the area at the time of the shooting.

¶ 17 On cross-examination, the State gave defendant an L-shaped piece of cardboard and asked him to demonstrate how the victim was holding the gun when the fatal shot was fired. The State indicated for the record that defendant was holding the cardboard gun with his arm outstretched in front of him at about shoulder height, with his wrist turned back, and with the barrel pointed approximately six inches above his head. However, on redirect, defendant testified that he did not specifically see where the barrel of the gun was aimed during his struggle

with the victim. Defendant also stated that Maurice was his cousin and friend. They had lived together, were close, and defendant loved him. Maurice was currently in college, but defendant did not know which college or even the state where Maurice currently lived. Defendant also did not know where his aunt Alberta Wilson was at the time of the trial.

¶ 18 In rebuttal, Detective Aguirre stated that after defendant was taken into custody and advised of his rights, he said he was in Bloomington at the time of the homicide. The State also submitted into evidence a certified statement of defendant's October 17, 2003 aggravated battery conviction.

¶ 19 The trial court instructed the jury on first degree murder, second degree murder based on an unreasonable belief of self-defense, and self-defense. The jury found defendant guilty of first degree murder.

¶ 20 The trial court denied defendant's post-trial motion. Defendant then filed a *pro se* motion alleging 17 counts of ineffective assistance of counsel. The court placed defendant under oath, questioned him, and denied the motion. Defendant was sentenced to 60 years' imprisonment. This appeal followed.

¶ 21

## II. ANALYSIS

¶ 22 On appeal, defendant contends that: (1) the trial court failed to exercise its discretion in admitting defendant's prior conviction; (2) the State's use of a cardboard cutout of a handgun during defendant's cross-examination deprived him of a fair trial; (3) the State improperly shifted the burden of proof during defendant's cross-examination and closing argument; and (4) the trial court failed to appoint new counsel to argue defendant's post-trial motion alleging ineffective assistance of counsel and erroneously denied that motion.

¶ 23

A. Prior Felony Conviction

¶ 24 Defendant argues that the trial court failed to exercise discretion and comply with the requisite multi-factor balancing test when it allowed into evidence defendant's prior felony conviction. According to defendant, the trial court erroneously thought the State was entitled to introduce defendant's 2003 aggravated battery conviction simply because defendant placed his credibility in issue by raising an affirmative defense. The record, however, refutes defendant's assertions.

¶ 25 Trial courts use the rule first adopted by our supreme court in *People v. Montgomery*, 47 Ill. 2d 510, 515 (1971), when exercising their discretion to allow impeachment of a witness's credibility by admitting a prior conviction. Under *Montgomery*, evidence of a prior conviction is admissible for the purpose of attacking a witness's credibility if: (1) the witness's crime was punishable by death or imprisonment for more than one year or the crime involved dishonesty or false statement regardless of the punishment; (2) the witness's conviction or release from confinement, whichever date is later, occurred less than 10 years from the date of trial; and (3) the danger of unfair prejudice does not substantially outweigh the probative value of the conviction. *Id.* at 516. The trial court may consider the nature of the crime, nearness or remoteness, the subsequent career of the person, and whether the crime was similar to the one charged. *Id.* at 518. Even if the trial judge does not expressly articulate the *Montgomery* standard, there is no reason to presume that the judge failed to weigh the probative value of the impeachment against its possible prejudicial effect where the record shows that the judge was fully aware of the *Montgomery* rule and the balancing test it requires. *People v. Williams*, 173 Ill. 2d 48, 83 (1996). Once the party seeking admission of a prior conviction satisfies the first

portion of the rule, the burden of persuasion to demonstrate that the prejudicial effect of such evidence substantially outweighs its probative value is on the party who seeks to exclude the conviction. *People v. Hawkins*, 243 Ill. App. 3d 210, 223 (1993). On appeal, the standard of review is deferential, and the trial court's decision whether to admit the evidence will not be disturbed absent an abuse of discretion. *People v. Barner*, 374 Ill. App. 3d 963, 970 (2007).

¶ 26 Contrary to defendant's argument on appeal, the record establishes that the trial court was fully aware of the *Montgomery* rule and its balancing test. Specifically, the parties referred to the balancing test in their arguments to the judge on whether defendant could be impeached with his earlier conviction. Before the trial began, defendant moved the court to preclude the State from introducing any evidence of his prior convictions for purposes of impeachment. The State, however, argued that defendant's 2003 robbery conviction involved a crime regarding truthfulness, was completely different from defendant's current murder charge, and any prejudice would be cured by the jury instruction. After hearing argument, the trial court allowed the State to use the 2003 robbery conviction, noting that it met the *Montgomery* qualifications because defendant's claim of self-defense placed his "credibility directly in the hands of the jury," robbery was a crime of truthfulness, and the conviction would be more probative than prejudicial.

¶ 27 In the middle of the State's case in chief, the State informed the trial court that, regarding its *Montgomery* ruling, although defendant was initially charged with robbery, his 2003 felony conviction was adjudicated as an aggravated battery. The judge reviewed the tendered certified copy of the aggravated battery conviction and inquired into the conviction in keeping with the *Montgomery* rule. Specifically, the court confirmed that defendant's aggravated battery

conviction was a felony even though he was sentenced to only one year of probation. After noting that courts must not wait until a defendant is about to take the stand to decide upon the admissibility of prior convictions, the court stated:

“Over the defense’s objection, I will allow the State to use this. I find the probative value does outweigh the prejudicial effect because here the Defendant would be placing his credibility squarely at issue with the jury. The opening was that certain matters happened, and that is directly contradictory to what the State’s witnesses have said. Credibility is an issue here. I will allow the State to use one prover to impeach credibility with the caveat that it cannot be argued that the Defendant is a convicted felon or he has a felony record or a history of violence or anything like that. That cannot be argued. The conviction can be given only in rebuttal as a certified copy introduced into evidence, and the only thing that can be mentioned is that it affects the credibility of the Defendant, not that it makes the Defendant violent in any way.”

¶ 28 The record clearly shows that the trial court found that the probative value of the conviction as it affected the credibility of the defendant outweighed the danger of unfair prejudice, both before trial when the parties and the court thought the 2003 felony conviction was for robbery, and during the trial once the State clarified that the 2003 felony conviction was in fact for aggravated battery.

¶ 29 Defendant’s alternative argument—that the trial court’s ruling was an abuse of discretion—also lacks merit. Defendant has not met his burden of demonstrating that the prejudicial effect of the admission of his 2003 aggravated battery conviction outweighed its

probative value. The question of his credibility was crucial. He was the only available person who testified about his fear of the victim and his belief that force was necessary to save first his cousin's life and then his own. Because defendant's credibility was critical to the determination of the truth, the probative value of the prior conviction used to impeach that credibility was enhanced. *Hawkins*, 243 Ill. App. 3d at 224.

¶ 30 Furthermore, the trial court took measures to lessen any prejudice by instructing the jury that the prior conviction was relevant to the issue of defendant's credibility only. In addition, the trial court warned the State not to use the conviction to support an argument of propensity for violence or other improper use, and our review of the record confirms that the State's closing argument complied with the trial court's ruling.

¶ 31 Finally, we reject, as unsupported by the case law, defendant's argument that an abuse of discretion is clear when a trial court allows the use of a prior aggravated battery conviction to impeach a defendant in a murder trial. See *Williams*, 173 Ill. 2d at 83 (finding no abuse of discretion where the trial court considered the relevant factors and allowed an aggravated battery conviction to impeach the defendant's credibility in a murder trial); *Hawkins*, 243 Ill. App. 3d at 223-25 (accord).

¶ 32 We find no error by the trial court in allowing defendant's prior aggravated battery conviction to impeach his credibility.

¶ 33 B. Demonstrative Evidence

¶ 34 Defendant argues that he was denied a fair trial when the State gave defendant an L-shaped piece of cardboard during his cross-examination and asked him to show how the victim was holding the gun when defendant pulled the trigger. Defendant claims the State used this in-

court experiment to demonstrate that the angle between the barrel of the cardboard replica of a gun did not match the location of the victim's wound. Defendant contends the trial court committed reversible error when it allowed the State to engage in this demonstration because there was no testimony that the piece of cardboard accurately depicted the handgun used in the shooting.

¶ 35 The admissibility of demonstrative evidence rests within the sound discretion of the trial court, and its decision shall not be disturbed on appeal absent a clear abuse of discretion. *People v. Madison*, 264 Ill. App. 3d 481, 487 (1994). The purpose of demonstrative evidence is to aid the trier of fact in interpreting, understanding and weighing other evidence or testimony (*People v. Cook*, 279 Ill. App. 3d 718, 725 (1996)), and the overriding considerations in admitting demonstrative evidence are relevancy and fairness (*People v. Burrows*, 148 Ill. 2d 196, 252 (1992)). Reversible error occurs if the demonstrative evidence is used for dramatic effect or emotional appeal rather than for a factual explanation useful to the reasoning of the jury. *Madison*, 264 Ill. App. 3d at 487.

¶ 36 Although this issue was not preserved for review with both a timely-made objection and inclusion in a post-trial motion, defendant asks this court to review this matter for plain error and asserts that the evidence was closely balanced. The plain-error doctrine allows a reviewing court to remedy a clear or obvious error either (1) where the evidence in the case is so closely balanced that the jury's guilty verdict may have resulted from the error and not the evidence, or (2) where the error is so serious that the defendant was denied a substantial right, and thus a fair trial. *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). Before addressing either prong of the doctrine, the court must determine whether a clear or obvious error occurred at all. *Id.*

¶ 37 We find that no error occurred. Contrary to defendant's characterization on appeal, the State did not conduct an experiment designed to show that the angle between the barrel of the cardboard gun replica did not match the location of the victim's wound. The State's purpose was not so scientific, and the State did not ask the jury to conclude that the trajectory of the bullet would have been six inches above the victim's head. Rather, the State used the cardboard cutout to assist the jury in understanding defendant's testimony and demonstration about his alleged struggle with the victim over the gun. See *People v. Williams*, 275 Ill. App. 3d 242, 248 (1995) (prosecutor's request that the defendant demonstrate a gang handshake did not deprive him of a fair trial where his gang affiliation was part of his defense and earlier testimony about gang affiliation included references to and demonstrations of the gang's handshake).

¶ 38 Defendant invited the use of demonstrative evidence when he, on direct-examination, gave detailed testimony and a demonstration regarding the victim's role as the aggressor and defendant's attempt to defend himself. Specifically, defendant showed the jury how the victim had his arm straight out in front of him when defendant rushed him, grabbed his arm, and raised it into the air before the first shot was fired. Then, defendant showed the jury how the victim was holding the gun when defendant bent the victim's wrist back so that the gun was pointing at the victim before the fatal shot was fired.

¶ 39 On cross-examination, the State simply pursued the defense's line of questioning by asking defendant to show the jury the same demonstration again, but this time holding the L-shaped cardboard cutout. The relevant issue was not any match between the victim's wound and the angle of the gun barrel, and testimony by a firearm's expert regarding ballistic trajectory was not necessary. Accordingly, the State's demonstration did not require identical specifications

between the cardboard cutout and the actual gun used in the shooting. Rather, the State used the cutout to help the jury understand defendant's testimony about the gun struggle so that the jury could judge the likelihood of the victim being hit by a bullet at all based on defendant's version of the events. Specifically, defendant claimed that when the fatal gunshot was fired, the victim was holding the gun with his arm outstretched and his elbow locked out at approximately his shoulder height with his wrist turned back. This resulted in the cardboard cutout pointing approximately six inches above defendant's head.

¶ 40 Furthermore, the State's demonstrative evidence was not used for dramatic effect or emotional appeal. The State asked defendant to use a harmless piece of cardboard to show the jury the alleged gun struggle, and defendant already had admitted that he fired the fatal gunshot. Consequently, we find no reason to disturb the trial court's ruling allowing the State to use the cardboard cutout during defendant's cross-examination. Defendant's objections regarding any differences in the size and barrel length of the cutout and the actual weapon go to the weight to be given the demonstration, not the admissibility of the demonstration itself. *People v. Pirello*, 166 Ill. App. 3d 614, 623 (1988).

¶ 41 Defendant cites *Madison*, 264 Ill. App. 3d 481, to support his claim that he was denied a fair trial, but that case is distinguishable. Two police officers saw defendant Madison in a parking lot standing next to a car with the hood raised. The defendant was holding an approximately three-pound, clear plastic bag containing three separate bags of several brown chunks of suspect heroin. *Id.* at 483. The chunks varied in size from golf balls to baseballs. When the defendant saw the officers, he dropped the bag under the hood and slammed it shut. The officers arrested the defendant and recovered the bag, which was subsequently confirmed by

chemical analysis to contain heroin. *Id.* By the time the case went to trial, the police department had destroyed the putative heroin despite a request to preserve it. *Id.*

¶ 42 The defense moved to dismiss, arguing, *inter alia*, that the jury needed to see the size, nature and packaging of the destroyed items. *Id.* at 484. The trial court denied the motion to dismiss, and allowed the two police officers to testify at trial while using a bag of brown sugar to demonstrate to the jury how the defendant held the suspect heroin chest high and stashed it under the car hood as the officers approached. *Id.*

¶ 43 On appeal, the court reversed the defendant's conviction for possession, held the State responsible for the loss of the evidence, and remanded for a new trial from which the State's chemist's testimony and chemical analysis results would be excluded. *Id.* at 497. Furthermore, the court concluded that the State's extensive use of the brown sugar prejudiced the defendant because the evidence of his guilt was not overwhelming and the brown sugar did not accurately depict the real evidence against him. *Id.* at 489. Specifically, the court reasoned that an accurate depiction of the destroyed evidence was necessary because the significant evidence was the controlled substance itself. *Id.* at 488-89.

¶ 44 Here, in contrast, the jury did not need to see an exact replica of the handgun defendant used and successfully hid from the police. As discussed above, the relevant issue was whether the use of the cardboard cutout helped the jurors more easily understand defendant's testimony about his struggle for the gun. After reviewing the record, we believe that it did. We find that the trial court did not abuse its discretion when it allowed the State to use the L-shaped piece of cardboard as a demonstrative exhibit.

¶ 45

C. Shifting the Burden of Proof

¶ 46 Defendant argues that the State improperly shifted the burden of proof during his cross-examination by asking him if he knew the whereabouts of two of his family members—his aunt Alberta and cousin Maurice. Additionally, defendant claims the State improperly argued in rebuttal closing argument that Maurice could have corroborated defendant's version of the events but defendant said he did not know where Maurice was, despite their close family relationship.

¶ 47 We find that the State's questions on cross-examination were proper impeachment of defendant's credibility. Furthermore, the State's reference to Maurice during its rebuttal closing argument was not improper.

¶ 48 A defendant who takes the stand on his own behalf not only offers himself as a witness, but also subjects himself to legitimate cross-examination. *People v. Jackson*, 391 Ill. App. 3d 11, 32 (2009). The latitude allowed on cross-examination rests within the sound discretion of the trial court, and the trial court's decision is not disturbed on appeal absent a clear abuse of discretion resulting in manifest prejudice to the defendant. *People v. Thompkins*, 121 Ill. 2d 401, 454 (1988). Although the scope of cross-examination is generally limited to matters raised on direct examination, including all matters which explain, qualify, discredit or destroy that direct testimony (*People v. Adams*, 111 Ill. App. 3d 658, 664 (1982)), the State may properly pursue a line of questioning initiated by the defendant (*People v. Delaney*, 63 Ill. App. 3d 47, 50 (1978)). Because one of the purposes of cross-examination is to test the credibility of the witnesses, any permissible kind of impeaching matter may be developed on cross-examination. *People v. Hall*, 195 Ill. 2d 1, 23 (2000).

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¶ 49 According to the record, defendant testified during cross-examination that he and Maurice were very close cousins and friends, they lived together, and defendant wanted to help him when defendant saw him struggling with the victim. The testimony continued as follows:

"Q. Where is [Maurice] now?

A. In school.

Q. Okay. At the time of this offense, you saw [Maurice] all the time, right?

A. At the time of the offense?

Q. You were living with him, right?

A. Yes.

Q. You were tight, right?

A. Yes.

Q. Where is he in school?

A. He is in college. I don't know what school he is at.

A. Where is he in college?

A. I don't know.

MS. MORIARITY [defendant's attorney]: Objection.

THE COURT: Overruled. You may answer the question.

A. I don't know what college he is going to.

Q. Do you know what state he lives in?

A. No, I don't know."

Shortly thereafter, defendant also testified that, after he shot the victim, his aunt Alberta pulled up in her car in the alley and got out. Then, defendant was asked:

"Q. And you don't know where she is today, do you?"

A. No.

MS. MORIARITY: Objection.

THE COURT: Overruled."

¶ 50 Defendant failed to preserve this issue for review by making both timely objections and raising the issue in a post-trial motion. Nevertheless, even under a plain-error analysis, we find that this questioning did not shift the burden onto defendant to present evidence of his innocence.

¶ 51 Because defendant testified on direct examination that he was unarmed yet rushed to confront the gun-wielding victim and prevented him from shooting defendant's beloved family member in the back, and because it was the State's contention that defendant and his cousin were the aggressors and defendant's aunt tried to stop defendant from shooting the unarmed victim, questions attacking defendant's credibility as to the nature and closeness of his family relationships were relevant in this case. Consequently, the State could and did properly ask defendant if he knew the current whereabouts of Maurice and Alberta Wilson. The State did not go beyond that proper questioning to ask defendant why his relatives were not in court or why he did not call them as witnesses to support his version of the events. Furthermore, defendant cites no relevant authority to support his claim that the State's line of questioning improperly insinuated that defendant failed to call those two non-alibi witnesses.

¶ 52 "A defendant who testifies in a criminal case and subsequently contradicts testimony of the State's witnesses subjects himself to questions formulated to point out these contradictions."

*People v. Evans*, 373 Ill. App. 3d 948, 962-63 (2007). See also, *People v. Scaggs*, 111 Ill. App. 3d 633, 635-36 (1982) (rejecting the defendant's argument that the State improperly questioned him about his companion, a witness at the scene of the shooting who was never called to testify, where defendant testified that the victim was the one who first pulled a gun but all three witnesses who testified at trial stated that the victim did not have a gun). The State did not improperly shift the burden of proof where the State never asked defendant why he failed to call his two family members as witnesses. We find neither a clear abuse of discretion nor prejudice to defendant in the cross-examination that was permitted.

¶ 53 Even assuming, *arguendo*, that the State's questioning improperly insinuated that defendant failed to present two non-alibi witnesses, defendant is not entitled to relief under the plain-error doctrine because the evidence of his guilt was overwhelming and any alleged error did not deny him a fair trial.

¶ 54 The evidence was not close. Three eyewitnesses testified consistently and credibly that: the victim was unarmed and unsuccessfully tried to fend off the punches and kicks from multiple attackers; only defendant had a gun; the victim never grappled with defendant for that gun; and defendant defied his aunt's attempts to stop him from shooting the unarmed victim. The eyewitnesses did not know the victim and no evidence established that they were biased against defendant. Furthermore, the forensic evidence corroborated the eyewitnesses' testimony that defendant stood a few feet away from the victim when the fatal gunshot was fired.

¶ 55 In contrast, defendant's testimony that he acted to defend Maurice and himself was uncorroborated, unbelievable, and impeached. Specifically, the forensic evidence concerning the absence of stippling on the victim's head wound or blood spatters on his hands refuted

defendant's testimony about grappling with the victim for the gun. Instead of telling the police that he was trying to defend himself or his cousin, defendant fled the scene, hid the gun and then falsely told the police that he was out of town at the time of the shooting. Moreover, defendant was unable to show any evidence of either the gunshots the victim allegedly had previously fired at defendant's home or the train tickets for defendant's planned trip out of town.

¶ 56 Any error did not deny defendant a fair trial. The jury heard about defendant's cousin Maurice and aunt Alberta throughout this trial. In opening statements, the State claimed that Maurice was beating the victim, and the defense claimed that defendant intervened to prevent the victim from shooting Maurice. The State's eyewitnesses said that Maurice was one of the attackers beating the victim and Alberta tried to stop defendant from shooting the unarmed victim. Defendant, however, said that Maurice was about to be shot in the back by the victim and Alberta did not arrive at the scene until after the fatal gunshot. By the end of defendant's case in chief, the jury clearly was aware that defendant's two relatives were at the scene, had played crucial roles, and were absent from the courtroom. Under these circumstances, any error by the State in asking defendant if he knew his relatives' current whereabouts was harmless beyond a reasonable doubt.

¶ 57 We also find no error in the State's rebuttal closing argument that defendant claimed to have a close family relationship with Maurice, who might have corroborated some of defendant's testimony, but defendant did not know where he lived or went to college at the time of the trial. In general, it is improper for the State to comment on the absence at trial of a non-alibi witness when the witness is equally accessible to both parties. *People v. Adams*, 109 Ill. 2d 102, 120-21 (1985); *People v. Zernel*, 259 Ill. App. 3d 949, 956 (1994). "A witness is not considered equally

accessible, however, if the witness, due to a familial relationship to the defendant, would likely be biased against the State." *Zernel*, 259 Ill. App. 3d at 956. In such cases, the State may properly comment on the witness's absence, particularly if "the witness could shed light on the accused's theory of defense." *Id.* at 957. Moreover, where the defendant is responsible for injecting a witness into the case, the State may properly comment on the defendant's failure to produce that witness. *Scaggs*, 111 Ill. App. 3d at 636; *People v. Armstead*, 322 Ill. App. 3d 1, 16 (2001).

¶ 58 The State is allowed wide latitude in fashioning a closing argument and may comment on the evidence and any reasonable inferences arising from the evidence. *People v. Perry*, 224 Ill. 2d 312, 347 (2007). Moreover, "reviewing courts in this State have consistently held that comment on the failure of a potential defense witness to testify is permitted when made in response to defense counsel's own reference to the State's failure to call the witness to the stand." *People v. Holman*, 103 Ill. 2d 133, 151 (1984); *People v. Nowicki*, 385 Ill. App. 3d 53, 91 (2008).

¶ 59 The State did not comment on Maurice Wilson's absence from the trial until after the defense raised the issue during its closing argument. Specifically, the defense criticized the State for not producing a forensic scientist and for presenting witnesses who did not see the shooting. Then defense counsel said, "Now, you may be asking yourself at this point where is Maurice Wilson?" Defense counsel stated that Maurice was in school, and the police must not have believed the State's occurrence witnesses because Maurice was not charged with accountability for murder in this case. Defense counsel added that Maurice would not want to testify in court because he might subject himself to being charged in this case. Defense counsel also argued that

the State should answer for the whereabouts of Maurice and Alberta Wilson because the State had the burden of proof.

¶ 60 In rebuttal, the State argued that one troubling aspect of defendant's testimony was his claimed friendship and closeness with Maurice, whom he rushed to defend from death at extreme peril to his own safety. Yet, even though Maurice held the key to defendant's freedom because Maurice should have been able to corroborate defendant's testimony, defendant did not even know where Maurice lived or went to school.

¶ 61 Our review of the record establishes that the State properly responded to arguments raised by defendant's closing argument and properly commented on the evidence and reasonable inferences drawn from the evidence. We conclude that defendant's arguments concerning improper burden shifting by the State lack merit.

¶ 62 D. *Pro Se* Motion Alleging Ineffective Assistance of Counsel

¶ 63 Defendant argues that he is entitled to a hearing with newly appointed counsel on his *pro se* post-trial motion alleging ineffective assistance of trial counsel. Specifically, defendant contends the trial court erred when it failed to appoint new counsel to represent defendant's interests before the court placed him under oath and conducted a lengthy and adversarial hearing on his 17 allegations of ineffective assistance of trial counsel. Defendant also contests the trial court's decision to deny the motion on the merits.

¶ 64 The appointment of new counsel is not required in every case where a defendant brings a *pro se* motion for ineffective assistance of trial counsel. *People v. Taylor*, 237 Ill. 2d 68, 75 (2010). The trial court should first examine the factual basis of the defendant's claim, which usually involves questioning trial counsel and the defendant regarding the facts and

circumstances surrounding the alleged claims. *People v. Moore*, 207 Ill. 2d 68, 78 (2003). The trial court must conduct an adequate inquiry into the *pro se* motion before the court can dismiss it. *People v. Banks*, 237 Ill. 2d 154, 214 (2010). If the trial court determines the claims lack merit or pertain only to matters of trial strategy, the trial court may deny the *pro se* motion without appointing new counsel. *Taylor*, 237 Ill. 2d at 75. However, if the allegations show possible neglect of the case, new counsel should be appointed to argue the claim of ineffective assistance at a post-trial hearing. *Moore*, 207 Ill. 2d at 78. New counsel is necessary to independently evaluate the defendant's claim and avoid a conflict of interest. *Id.* The trial court's exercise of discretion will not be reversed on appeal unless the trial court's action was manifestly erroneous. *People v. McCarter*, 385 Ill. App. 3d 919, 941 (2008).

¶ 65 According to defendant, the trial court went beyond conducting a preliminary inquiry because defendant, without an attorney to advise him or make objections on his behalf, was interrogated under oath at length and in detail about the accuracy of the claims in his motion. Defendant asserts that the trial court's questioning grew increasingly adversarial before the trial court found trial counsel's account of events more credible than defendant's and dismissed his motion. Furthermore, defendant complains that the examination was not limited to securing the court's understanding of defendant's claims but, rather, the veracity of his claims. According to defendant, the trial court assumed the role of a prosecutor and sought to impeach defendant. Defendant asserts that the trial court, instead of determining that defendant's allegations were facially insufficient, improperly denied his motion based on a finding that his account was not credible.

¶ 66 Defendant cites no relevant authority to support his claim that the examination conducted by the trial court here constituted an improper hearing without the benefit of newly appointed counsel simply because defendant was placed under oath before the trial court questioned him at length about his multiple claims of ineffective assistance of counsel. Although a brief discussion between the trial court and a defendant may suffice as an adequate inquiry (*Moore*, 207 Ill. 2d at 78), the trial court here properly exercised its discretion to engage defendant in an extended discussion, particularly because his claims were poorly written and vague and his responses to the trial court's questions were unclear or evasive. Furthermore, our review of the record does not support defendant's claim that the judge assumed the role of the prosecutor.

¶ 67 According to the record, the trial court, which was aware of the law on this issue, read aloud each allegation in the *pro se* motion and then asked defendant whether it was accurate and to specify his vague and convoluted complaints and give details surrounding his allegations. For example, the judge asked defendant what he remembered about various conversations with his trial counsel, when they occurred, who was present, whether he complained to anyone else, and whether he remembered the trial court's admonitions during the course of his trial. The judge also inquired into the identities of the alleged missing witnesses, the substance of their proposed testimony, and the extent to which trial counsel knew and acted upon the existence of such witnesses. The trial court made every effort to ascertain the nature and substance of defendant's claims by prompting him to describe in detail the factual basis of his claims.

¶ 68 After defendant was given every opportunity to explain his complaints and waived his attorney-client privilege, his trial counsel responded to each allegation with specific facts and circumstances about her conversations with defendant, investigation of his case, her choices

regarding trial strategy, and her professionalism.

¶ 69 After this inquiry into the factual basis of defendant's claims, the trial court described the impressive, organized, prepared and vigorous defense trial counsel had rendered throughout the proceedings. See *People v. Vargas*, 393 Ill. App. 3d 465, 478 (2009) (trial court may use its knowledge of counsel's efforts and performance during the trial as a basis for an evaluation of the *pro se* claim of ineffective counsel). The trial court noted that counsel reviewed the police records and investigated potential witnesses, and determined not to call witnesses whose testimony would have been harmful to defendant's case. The trial court concluded that defendant's allegations were “truly baseless” and denied his *pro se* motion. We find no abuse of discretion in the manner in which the trial court conducted the preliminary inquiry of defendant's *pro se* motion.

¶ 70 We also reject defendant's alternative argument that the trial court's dismissal of his motion was an abuse of discretion. Specifically, defendant argues that he established trial counsel's possible neglect in the case because she acknowledged that she did not seek out or interview Maurice Wilson. Defendant's characterization of trial counsel's discussion with the trial court is not accurate. According to the record, trial counsel said that she sent multiple investigators to find and interview various witnesses. She also reviewed the statements made by various witnesses in the police reports to determine whether their potential testimony could assist defendant's claim of self-defense. Based upon her investigation, she concluded that the testimony of Alberta and Maurice Wilson would be harmful to defendant's case.

¶ 71 Counsel's decision certainly comports with defendant's trial testimony that Maurice, who had his back to the victim when the victim allegedly pointed the gun, did not see the shooting.

Even defendant acknowledged during the preliminary inquiry that—aside from Maurice testifying about how his fight with the victim began—defendant did not know what Maurice would have said if he had testified. It is reasonable to infer that because Maurice was arrested and questioned in this case but not charged, he gave the police information that was not favorable to defendant. The record supports the trial court's decision that defendant's *pro se* motion was "truly baseless."

¶ 72

### III. CONCLUSION

¶ 73 For the foregoing reasons, we affirm the judgment of the circuit court.

¶ 74 Affirmed.