2015 IL App (1st) 131143-U

SIXTH DIVISION
December 18, 2015

No. 1-13-1143

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court
	)	of Cook County.
Plaintiff-Appellee,	)	
	)	No. 06 CR 10913
v.	)	
	)	
ANDREW ANDERSON,	)	
	)	Honorable
Defendant-Appellant.	)	Michele M. Simmons,
	)	Judge Presiding.

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

ORDER

¶ 1 *Held*: The defendant's conviction for first degree murder was affirmed where: (1) the defendant was not denied the effective assistance of counsel; (2) the trial court's denial of the defendant's motion to suppress his confession was not error; (3) the trial court's denial of the defense discovery request was proper; (4) the trial court did not err when it barred evidence that the defendant alleged supported his theory of self-defense; (5) the defendant's constitutional right to confront the witnesses against him was not violated; (6) there was no error in admitting the transcript of the defendant's videotaped confession into evidence and allowing the jury to use it during deliberations; (7) the failure to instruct the jury on the use of the transcript of the videotaped confession was harmless error; (8) the trial court did not tell the jury that the defendant's entire testimony was not credible; (9) the defendant forfeited the error as to the prosecutors' closing and rebuttal arguments; and (10) the cumulative effect of the complained of errors did not require reversal of the defendant's conviction and a new trial.

¶ 2 The defendant, Andrew Anderson, and the co-defendant, Kendall McDowell (Mr. McDowell), were charged by indictment with first degree murder in connection with the death of Troy Pickett (the victim). The defendant's and Mr. McDowell's cases were severed for trial and proceeded simultaneously before different juries. The jury found the defendant guilty of the first degree murder of the victim. The jury further found that in committing the murder, he had discharged a firearm proximately causing the death of the victim. The trial court sentenced the defendant to consecutive sentences of 35 years' imprisonment for first degree murder and 25 years' imprisonment for the discharge of a firearm resulting in the victim's death. The defendant appeals. [1]

¶ 3 On appeal, the defendant does not challenge the sufficiency of the evidence. However, he contends that: (1) defense counsel was ineffective when he failed to request that the trial court reconsider its denial of the defendant's motion to quash arrest and suppress evidence; (2) his confession was involuntary; (3) the trial court's refusal to order the State to tender the victim's arrest reports to the defense was erroneous; (4) the trial court erred when it barred testimony in support of his claim of self-defense; (5) the trial court erred when it allowed the

[1]Mr. McDowell was also found guilty of the murder of the victim, but he is not a party to this appeal.

jury to substantively consider an unreliable and damaging statement by Mr. McDowell; (6) the trial court erred when it admitted the State's transcript of his videotaped confession into evidence and allowed the jury to use the transcript without the videotape; (7) the trial court erred when it failed to instruct the jury on the use of the transcript of his videotaped confession; (8) the trial court erred when it told the jury that parts of his testimony were unreliable; (9) the prosecutors' closing argument denied him a fair trial; and (10) the cumulative effect of the errors denied him a fair trial and due process of law. A summary of the evidence pertinent to the issues raised on appeal follows below.

¶ 4 BACKGROUND

¶ 5 On February 4, 2006, the victim was found shot to death. On April 9, 2006, the defendant and Mr. McDowell were arrested for loitering and transported to the Robbins police station. The defendant was interrogated regarding the victim's murder. After giving a videotaped confession, he was charged with the victim's murder.

¶ 6 I. Pretrial Proceedings

¶ 7 The defendant filed separate motions to quash his arrest and suppress evidence, and to suppress his confession. Separate hearings were conducted on the motions.

¶ 8 A. Motion to Quash Arrest and Suppress Evidence

¶ 9 1. *Officer Jeff Lockett*

¶ 10 On April 9, 2006, Officer Lockett was in uniform and on duty driving a marked police vehicle. At 7 a.m., the officer responded to a call of shots fired by two black men in the vicinity of 139th and Grace Streets in Robbins, which he described as a high crime area. As Officer Lockett arrived on the scene, he observed the defendant and Mr. McDowell running. Together with other police officers on the scene, the officer apprehended them. Neither the

defendant nor Mr. McDowell was seen to discard a weapon, and no weapon was found after each man had been searched. The defendant and Mr. McDowell were arrested and taken to the Robbins police station where they were issued tickets for loitering. The defendant's ticket listed his address as 13958 Grace Street. Alerted by other officers that Robbins police detective, Dion Kimble, was looking for the defendant and Mr. McDowell, Officer Lockett contacted Detective Kimble.

¶ 11 Officer Lockett admitted that he arrested the defendant and Mr. McDowell because he observed them running and because they were the only black males in the area. The officer also wanted to ascertain their identities. Neither the defendant nor Mr. McDowell gave the officer any identification or provided his name. [2] They explained they were just "hanging out." At the Robbins police station, the defendant gave his real name to Officer Lockett. The defendant was not further investigated in connection with the shots-fired report.

¶ 12 2. *Detective Dion Kimble*

¶ 13 Detective Kimble testified in detail about his investigation of the victim's murder which subsequently led him to arrest the defendant. On February 4, 2006, Detective Kimble went to the murder scene where he observed the victim's body in the driver's seat of a vehicle that was lodged against a tree; he had been shot in the back of the head. On February 6, 2006, Mr. McDowell and Allante Anderson, the defendant's brother, appeared at the Robbins police station because they heard their names mentioned in connection with the victim's murder. Mr. Anderson provided proof of an alibi for the time of the murder. While denying his involvement, Mr. McDowell told Detective Kimble that Dave Hawthorne might be able to

[2] Officer Lockett acknowledged that the defendant and Mr. McDowell had given names to him but not their correct names.

assist him. In a telephone conversation with the detective, Mr. Hawthorne denied that he had any involvement in the murder and refused to come to the Robbins police station.

¶ 14 In the course of his investigation, Detective Kimble received several anonymous telephone calls relating that Mr. McDowell was bragging that he had gotten away with the victim's murder and that both the defendant and Mr. McDowell were driving around with guns. They were threatening to kill people, like they did the victim, if they said anything about the shooting.

¶ 15 Tiffany Jones, a relative of the victim, called the Robbins police station and spoke with Detective Kimble. Ms. Jones had received a telephone call in which the caller threatened to kill her family members if they continued to mention the names of the defendant and Mr. McDowell. Ms. Jones told Detective Kimble that she recognized the caller's voice as that of Mr. Anderson, who demanded that she stop mentioning the defendant's name. There was another voice in the background that she recognized as that of Mr. McDowell, who threatened to shoot her like the victim. Ms. Jones filed a police report in connection with the incident.

¶ 16 In an interview with Darius Wilson, Detective Kimble learned that Mr. Wilson had seen the defendant, Mr. McDowell and the victim together on the day of the murder; both the defendant and Mr. McDowell had guns. Mr. McDowell told Mr. Wilson to go into his house and not to come out.

¶ 17 Following up on information he received at a meeting with Terry Pickett, a relative of the victim, Detective Kimble contacted Michelle Weatherspoon, Mr. McDowell's girlfriend. Ms. Weatherspoon invoked her right to counsel. The detective then met with Joe Dorsey, who related information he received from his nephew, George Enge, who was then in Cook

County jail on a gun charge.[3] According to Mr. Dorsey, Mr. Enge knew that the defendant, Mr. McDowell and the victim were in a car going to buy "weed" and that the defendant shot the victim in the head. Mr. Enge believed the murder was "payback" for the victim's theft from the defendant and Mr. McDowell. Following the murder, the defendant and Mr. McDowell were picked up by Ms.Weatherspoon. Mr. Enge was concerned that the gun he was arrested with was the gun used to kill the victim.

¶ 18 In March 2006, Erica, the victim's girlfriend, told Detective Kimble that the defendant and Mr. McDowell said to her, " '[The victim] is gone. What are you going to do now?' " An anonymous call led the detective to interview Rashawn Sanders, an inmate at the Cook County jail. After a promise of confidentiality, Mr. Sanders related that the defendant told him he had shot the victim because the victim was telling the police that the defendant's cousin was involved in a murder at a liquor store. Mr. Sanders further related that Mr. McDowell had also shot the victim. Mr. Sanders' information confirmed the detective's knowledge from his investigation and the autopsy report that two guns were used and that the victim was shot twice.

¶ 19 In analyzing the evidence presented at the hearing, the trial court distinguished what Detective Kimble learned from the anonymous tips from the actual interviews. It noted that some of the anonymous tips led the detective to individuals who had personal knowledge of the defendant's statements pertaining to the murder of the victim and the reason for the murder. That information confirmed what the detective knew from the investigation and from the autopsy report. Under the totality of the circumstances analysis, the trial court found that

[3] Mr. Enge's first name was later revealed to be "Gregory."

on April 9, 2006, Detective Kimble had probable cause to arrest the defendant and Mr. McDowell for the murder of the victim.

¶ 20 B. Superseding Motion to Suppress Statements[4]

¶ 21 1. *Detective Kimble*

¶ 22 On April 9, 2006, Detective Kimble was informed that the defendant was in the Robbins police station. Prior to questioning the defendant and Mr. McDowell, Detective Kimble overheard a conversation between the two while they were in separate holding cells. The defendant told Mr. McDowell that the police had no evidence and warned him not to say anything. Mr. McDowell replied that he did not know that the defendant was going to shoot the victim. The defendant again warned Mr. McDowell not to say anything. After speaking with Mr. McDowell, Detective Kimble interviewed the defendant.

¶ 23 The first interview with the defendant took place around 1 a.m. on April 10, 2006.[5] Detective Kimble gave the defendant his *Miranda* warnings. The defendant signed and initialed the rights waiver and indicated that he understood his rights. When Detective Kimble questioned the defendant about the victim's murder, the defendant stated that he did not know anything about it, and the interview was terminated.

¶ 24 After speaking again with Mr. McDowell, Detective Kimble conducted a second interview with the defendant at 8:40 p.m. on April 10, 2006. Officer Lockett was present at the second interview. Detective Kimble again administered *Miranda* warnings to the defendant. Again, the defendant initialed and signed the waiver form and acknowledged that he understood his rights. The interview lasted an hour with Detective Kimble doing most of

[4] Following the denial of the motion to quash arrest and suppress evidence, the public defender withdrew, and new counsel was appointed for the defendant. Counsel filed a motion to suppress statements which superseded the original motion filed by the public defender.

[5] All three interviews were videotaped.

the talking in an effort to persuade the defendant to answer his questions. The defendant was tearful at one point but had no reaction when the detective confronted him with the conversation he overheard between the defendant and Mr. McDowell and the information he had gotten from his interview with Mr. McDowell. Detective Kimble terminated the interview and left ahead of Officer Lockett who escorted the defendant from the interview room. As the three men proceeded down a stairway, the defendant stopped and spoke to Officer Lockett. Officer Lockett told Detective Kimble that the defendant now wished to talk to him.

¶ 25 Upon returning to the interview room, the defendant told Detective Kimble and Officer Lockett about his involvement in the victim's murder. The defendant appeared relieved to be talking about the murder. The detective confirmed that all of the conversations and details regarding the defendant's involvement in the victim's murder were contained on the same videotape.

¶ 26 Detective Kimble was familiar with the personnel of the Robbins police department. There was no "Captain Davie" or anyone close to that name or matching the description of a tall, thin, dark-complexed African-American male, in his 40's, on the department. To the detective's knowledge, no one of that description wearing a white shirt ever spoke to the defendant. Detective Kimble described the victim's reputation in the community as that of a bully who sold drugs.

¶ 27 Detective Kimble denied that the defendant was threatened or promised anything in return for his confession. The detective acknowledged that in the first interview, he told the defendant that he had enough evidence to "lock him up." The detective acknowledged telling the defendant he was facing penitentiary time but that if he explained what happened he

might still go home. Detective Kimble explained that he mentioned the defendant's mother and brother only in an effort to get the defendant to talk to him. Mr. McDowell was placing the blame for the murder on the defendant. The detective did not want the defendant to go to jail for something Mr. McDowell alone had done, and the defendant could help himself by talking to the detective about the circumstances of the victim's murder.

¶ 28 2. *Officer Lockett*

¶ 29 Officer Lockett was present at Detective Kimble's second and third interviews with the defendant. At the second interview, the defendant answered some of Detective Kimble's questions. The defendant appeared remorseful; he kept his head down, and occasionally he would cry. Detective Kimble appeared exhausted and terminated the interview.

¶ 30 Detective Kimble left the interview room, and Officer Lockett followed with the defendant. As they got to the stairs going to the lockup, the defendant stopped. When Officer Lockett asked if he wanted to say something, the defendant stated that he wished to talk to Detective Kimble. The three men returned to the interview room.

¶ 31 Officer Lockett denied that he had any conversations with the defendant relating to members of the victim's family knowing that on April 9, 2006, he was in custody for the murder of the victim or that the victim's family would take matters into their own hands if the Robbins police did not act. The officer further denied that he told the defendant to remember what had happened to his "uncle." Officer Lockett observed nothing in the defendant's demeanor indicating that he was talking to Detective Kimble because he had been threatened or because the detective had promised him something.

¶ 32 After the trial court had reviewed the videotape of the defendant's statement, both sides rested. The trial court found under the totality of the circumstances that the defendant's statement was voluntary and denied his motion to suppress his confession.

¶ 33 C. Remaining Pretrial Motions

¶ 34 The trial court heard argument on the defendant's motion for the admission of *Lynch* material and for discovery of the victim's arrest records that defense counsel believed might contain *Lynch* material.[6] The trial court denied the motion, but further ruled that the defendant could testify about *Lynch* evidence if referenced in his videotaped confession. The court denied defense counsel's request that the State provide the victim's arrest records. The court instructed defense counsel to subpoena the records again and to return to court if the Robbins police did not comply with his subpoena.

¶ 35 The court heard argument on the defendant's motion to redact portions of his videotaped statement. The court granted some of the requested redactions and denied others. The trial court granted the defendant's request to sever his trial from that of Mr. McDowell's.

¶ 36 The trial court's rulings on the contested motions will be set forth in greater detail in our analysis of the issue to which they pertain.

¶ 37 II. Jury Trial

¶ 38 A. For the State

¶ 39 The State presented physical and medical evidence establishing that the victim died as a result of multiple gunshot wounds, fired by separate guns. The victim's death was classified as a homicide. A gun was recovered from the victim's car, but it was not one of the guns used to kill the victim.

[6]Evidence in support of the defendant's claim of self-defense is admissible if relevant and reliable under *People v. Lynch*, 104 Ill. 2d 194 (1984).

¶ 40 1. *Justenn Tyra*

¶ 41 Around 6 p.m. on February 4, 2006, Justenn Tyra was walking to a relative's house when he observed a white car hit a tree. Two men dressed in black and their heads covered with black hoods emerged from the front passenger door and the backseat door of the car and ran from the scene. Mr. Tyra was not able to see the faces of the two men.

¶ 42 2. *Detective Kimble*

¶ 43 Detective Kimble's testimony concerning his investigation of the victim's murder and leading up to the taking of the defendant's statement was consistent with his testimony at the hearings on the defendant's motions to quash arrest and suppress evidence and to suppress the defendant's confession. The detective interviewed the defendant after he had interviewed Mr. McDowell.

¶ 44 Through Detective Kimble, the State laid a foundation for the admission of the defendant's videotaped confession and the transcript of the videotape. The trial court informed the jury that they were about to review the videotape of an interview between the defendant and Detective Kimble. The court instructed the jury that portions of the videotape had been redacted and that they were not to speculate about the reasons for the redactions. The court further instructed the jury that Detective Kimble's references to conversations with other individuals were to be considered not for their truth but only to show how those conversations affected the defendant. It was for the jury to consider what weight would be given that evidence. The jury then viewed the videotape of the defendant's statement.

¶ 45 3. *Officer Lockett*

¶ 46 Officer Lockett testified consistently with his testimony at the hearing on the defendant's motion to suppress statements.

¶ 47 4. Gregory Enge, Jr.

¶ 48 At the time of the jury trial, Gregory Enge, Jr. was 22 years-of-age and was serving a 25-year sentence in Iowa for selling drugs. At the time of the victim's murder, Mr. Enge was 15 years-of-age. Mr. Enge was a friend of the defendant's.

¶ 49 In February 2006, Mr. Enge was in the Robbins area when he heard that the victim had been killed. Mr. Enge denied that the defendant and Mr. McDowell shot the victim while the three men were together in the victim's car. Mr. Enge denied being asked questions under oath by an assistant State's Attorney before the grand jury. When shown his grand jury testimony contradicting his trial testimony, Mr. Enge denied appearing before the grand jury, maintaining that he did not know what a grand jury was.

¶ 50 Mr. Enge recalled having a conversation with two Cook County assistant State's Attorneys a few days prior to his trial testimony in this case. In the conversation, he told them he did not remember talking to the defendant and Mr. McDowell or testifying before the grand jury. Mr. Enge denied that he told the two ASA's that he did remember being at the courthouse at 26th Street and California Avenue, accompanied by his mother, and speaking to the grand jury. The witness maintained that he did not know what a grand jury was. He did remember saying that he was with his mother and a group of people, but it did not take place at 26th Street and California Avenue.

¶ 51 Mr. Enge consumes alcohol and smokes marijuana. Mr. Enge denied using cocaine or heroin but claimed to have used drugs all his life, including during February 2006. The witness had been diagnosed ADHD and with a bipolar condition, which affected his ability to remember and perceive events. He did not know what was going on while he was testifying at the trial in this case. Mr. Enge recalled that Detective Kimble came to his house and told

him he would be charged in connection with the victim's murder if he did not testify before the grand jury.

¶ 52 The prosecutor asked Mr. Enge if he was questioned by an assistant State's Attorney at the grand jury proceedings as to whether he was threatened or forced to testify or was testifying voluntarily at that proceeding. The prosecutor asked Mr. Enge if, in response to the assistant State's attorney's questions, he testified that he was told it was in his own best interest to testify and that he was testifying of his own free will and not because of any threats. Above all, he was to testify truthfully. Mr. Enge denied that he had ever been asked or answered those questions before the grand jury.

¶ 53 5. *Detective Kimble*

¶ 54 Detective Kimble was recalled as a witness. On May 5, 2006, the detective drove Mr. Enge, accompanied by his mother, to testify before the Cook County grand jury. Detective Kimble denied that he had threatened to charge Mr. Enge with murder if he did not testify. It was Mr. Enge's mother who convinced Mr. Enge to testify. Mr. Enge did testify before the grand jury.

¶ 55 6. *Assistant State's Attorney Joseph Kosman*

¶ 56 ASA Kosman and ASA Ted Lagerwall[7] spoke with Mr. Enge a few days prior to his trial testimony. In the conversation, Mr. Enge told them that he remembered going to 26th Street with his mother and testifying before the grand jury. Mr. Enge could not remember the contents of his testimony, in particular, whether he ever spoke to the defendant or Mr. McDowell about the victim's murder.

¶ 57 7. *Assistant State's Attorney Lorraine Lynott*

[7] ASA Lagerwall was one of the prosecutors at the defendant's trial.

¶ 58 On May 5, 2006, ASA Lynott met with Mr. Enge prior to his appearance before the grand jury. Mr. Enge was accompanied by his mother and Detective Kimble. ASA Lynott explained the grand jury procedure to Mr. Enge and then brought him into the grand jury room to testify. ASA Lynott identified the transcript from Mr. Enge's grand jury testimony and confirmed that he had been questioned about the victim's death and had testified that the defendant admitted shooting the victim. She confirmed that Mr. Enge stated that he was testifying of his own free will and that he was told to tell the truth.

¶ 59 Over the defendant's objection, the videotape and transcription of the videotape were admitted into evidence. The trial court denied the defendant's motion for a directed verdict.

¶ 60 B. For the Defendant

¶ 61 The defendant was the sole witness for the defense. He testified on his own behalf as follows.

¶ 62 In February 2006, the defendant was 17 years-of-age, 5' 7" tall and weighed 135 pounds.[8] The defendant acknowledged that he had shot the victim. He did so because he was scared and in fear for his life.

¶ 63 The defendant and the victim were from the same neighborhood in Robbins. Prior to February 4, 2006, the victim required the defendant to call him "King." The victim was 6' 4" tall and heavier than the defendant. The victim had struck the defendant many times, but the defendant never fought back.

¶ 64 In 2005, the defendant witnessed the victim shooting at Dave Hawthorne because he believed that Mr. Hawthorne had told the police that he had seen the victim kill an individual. To avoid what happened to Mr. Hawthorne, the defendant did not report the shooting

[8]The defendant turned 18 years old on March 16, 2006.

incident to the police. The victim had several guns including a favorite he called "Charles Manson." In the winter of 2005, the defendant's cousin told him he had witnessed the victim killing "Be." The defendant had difficulty believing what his cousin told him because Be was the type of person no one would want to hurt, and Be got along with the victim. After Be was killed, the defendant knew that the victim would have no trouble killing him. The defendant explained to Detective Kimble that he did not want to get into the car with the victim because he thought the victim was going to kill him

¶ 65 When he was first questioned by Detective Kimble, he denied being involved in the victim's murder, because he was not ready to come forward and did not trust the detective. Eventually, the defendant did tell the detective what happened.

¶ 66 In the early evening of February 4, 2006, the defendant was standing outside a friend's house with Mr. McDowell and Darius Wilson when the victim drove up in a white four-door car. The defendant was selling drugs and had started walking towards another car to make a sale. The victim stopped him and asked what the defendant had for him. After the defendant gave him some drugs, the victim went over the other car and appeared to be engaged in a transaction with the individual inside the car. The victim then pointed his gun inside the car, and the driver drove away.

¶ 67 When the defendant told the victim he did not have any more drugs, the victim responded that a friend in Blue Island had some. The defendant hung back while the victim and Mr. McDowell walked to the victim's car. The victim instructed the defendant to join them. Feeling that he had no choice, the defendant complied. The victim, who was driving, put his gun on the floor. The defendant had a gun which he kept in his pocket.

¶ 68 The defendant, who was in the back seat, noticed that the victim was taking a longer route to Blue Island. The victim asked the defendant if he had any money. The defendant said no, and then felt a tap on his knee and looked up to see the victim smiling at him. The defendant was familiar with that particular facial expression of the victim. It meant that the victim was going to do something to him, even shoot him. After smiling at him, the victim turned back and moved toward his gun. Remembering what happened to Be and Mr. Hawthorne, the defendant became frightened, closed his eyes and fired a shot, striking the victim in the back of the head. He insisted that he did not aim at anything in particular when he fired the shot and did not know how many shots he fired. The defendant maintained that before firing the shot that killed the victim, he was scared and thought the victim was going to kill him.

¶ 69 Following the shooting, he "balled up into a ball," and the car crashed into a tree. The defendant exited the car, walking not running because he was "in shock." He heard a second shot and asked Mr. McDowell why he shot the victim. The defendant then left the area. Later that same night, the defendant gave the gun he used to Mr. Anderson.

¶ 70 The defendant admitted lying to Detective Kimble when he told the detective that he had nothing to do with the victim's death and that the victim had never done anything to him and he had not seen the victim do anything to another individual. The remainder of his statement was the truth.

¶ 71 The defendant obtained drugs to sell from the victim. The victim would give him the drugs and tell him what he wanted back. The defendant had a gun with him that night because Mr. Anderson had asked him to keep it for him temporarily. He did not get in the car intending to kill the victim. Before the defendant fired his gun, the victim smiled at him

and made a move toward his own gun. The defendant acknowledged that he did not tell Detective Kimble that the victim was reaching for his own gun before the defendant fired. After hearing the second shot, the defendant asked Mr. McDowell why he had shot the victim since he was already dead.

¶ 72 III. The Verdict and Sentencing

¶ 73 Following deliberations, the jury returned a verdict finding the defendant guilty of the first degree murder of the victim. The jury found that in committing the murder, the defendant discharged a firearm.

¶ 74 Following the denial of the defendant's motion for a new trial, the trial court sentenced the defendant to consecutive terms of 35 years' imprisonment for first degree murder and 25 years' imprisonment for discharging a weapon resulting in the victim's death. The defendant's motion for reconsideration of his sentences was denied. This appeal followed.

¶ 75 ANALYSIS

¶ 76 I. Ineffective Assistance of Counsel

¶ 77 The defendant contends that defense counsel was ineffective for failing to renew his motion to quash arrest and suppress evidence where Detective Kimble's trial testimony precluded a finding of probable cause to arrest.

¶ 78 A. Standard of Review

¶ 79 Where the facts surrounding the ineffectiveness claim are undisputed and the claim was not raised in the trial court, our review is *de novo*. *People v. Berrier***,** 362 Ill. App. 3d 1153, 1167 (2006).

¶ 80 B. Discussion

¶ 81 In order to establish ineffective assistance of counsel, the defendant must show that (1) counsel's performance was deficient, and (2) the deficient performance prejudiced the defendant. *People v. McGhee*, 2012 IL App (1st) 093404, ¶ 11; *Strickland v. Washington*, 466 U.S. 668 (1984). The defendant must establish both the deficiency of the performance and the resulting prejudice to him or the claim fails. *People v. Simms*, 192 Ill. 2d 348, 362 (2000).

¶ 82 The defendant argues that, following Detective Kimble's trial testimony, defense counsel should have moved for the trial court to reconsider its denial of his motion to quash and suppress evidence. See *People v. Brooks*, 187 Ill. 2d 91, 128 (1999) (failure to request reconsideration of the court's pretrial ruling on a motion to suppress when the evidence was introduced at trial waives the right to argue the trial evidence on appeal). The defendant maintains that defense counsel's error prejudiced him because the renewed motion was meritorious, and there was a reasonable probability that had the arrest been quashed and the evidence obtained as a result of the arrest been suppressed, the trial outcome would have been different. *People v. Henderson*, 2013 IL 114040, ¶ 15; *People v. Causey*, 341 Ill. App. 3d 759, 767 (2003) (the defendant must show that the trial court would have reversed its previous decision and granted the motion in light of the trial testimony).

¶ 83 "A warrantless arrest is lawful where police have knowledge of facts which would lead a reasonable person to believe that a crime has occurred and that the person to be arrested committed the crime." *People v. Chapman*, 194 Ill. 2d 186, 216-17 (2000). The determination of probable cause to arrest focuses on the factual considerations upon which reasonable, prudent people, not legal technicians, act. *Chapman*, 194 Ill. 2d at 217. The

standard for determining whether probable cause is present is the probability of criminal activity rather than proof beyond a reasonable doubt. *Chapman*, 194 Ill. 2d at 218.

¶ 84 During the hearing on the motion to quash arrest, Detective Kimble testified in great detail as to his investigation into the death of the victim leading to the defendant's arrest for the victim's murder. He acknowledged that he did not obtain a warrant for the defendant's arrest for murder. At trial, Detective Kimble was questioned by the prosecutor about the process for obtaining a warrant. The detective explained as follows:

> "You have to have evidence. You have to have enough evidence to say that this person warrants a warrant. I can't just walk there there [*sic*] and ask the judge to give me a warrant for this person and I can't present anything to her or him, so I have to have enough evidence to get a warrant.
>
> Q. And when you spoke to this individual, [the defendant], you hadn't reached that point yet, right?
>
> A. No."

¶ 85 The defendant maintains that the trial court's determination that there was probable cause to arrest the defendant for murder was based entirely on Detective Kimble's testimony at the hearing. He then points to Detective Kimble's testimony at trial that on April 9, 2006, when he interviewed the defendant, he did not have enough evidence to obtain a warrant for the defendant's arrest. The defendant argues that had defense counsel renewed the motion to quash his arrest, the trial court would have reversed its decision and granted the motion because, contrary to his testimony at the hearing on the motion, Detective Kimble admitted at trial that he did not have probable cause to arrest the defendant for murder.

¶ 86 The defendant cannot establish his claim to ineffective assistance of counsel. The trial court was aware that Detective Kimble had not obtained a warrant for the defendant's arrest for the victim's murder when it found probable cause to arrest. Moreover, " '[A] police officer's subjective belief as to the existence of probable cause is not determinative.' " *Chapman*, 194 Ill. 2d at 218-19 (quoting *People v. Buss*, 187 Ill. 2d 144, 209 (1999), *abrogated on other grounds by In re G.O.*, 191 Ill. 2d 46-50 (2000)). Comparing Detective Kimble's testimony at the hearing on the motion to quash arrest to his trial testimony that he did not have sufficient evidence to ask for a warrant to arrest the defendant, we cannot conclude that had defense counsel renewed the motion to quash arrest, the trial court would have reversed itself and granted the motion to quash the defendant's arrest for the victim's murder.

¶ 87 Since a renewed motion to quash arrest would not have been granted, the defendant cannot establish the prejudice necessary to proceed on his ineffectiveness claim. *People v. Givens*, 237 Ill. 2d 311, 331 (2010) (counsel is not required to file futile motions in order to provide effective assistance). Therefore, we reject the defendant's claim of ineffectiveness of counsel.

¶ 88 II. Motion to Suppress Statements

¶ 89 The defendant contends that the trial court erred when it denied his motion to suppress his statement to Detective Kimble in which he admitted shooting the victim. He maintains that his statement was involuntary in that it resulted from his prolonged detention, his age and inexperience with the criminal justice system, and the promises and threats made by Detective Kimble.

¶ 90 A. Standard of Review

¶ 91 In reviewing a trial court's ruling on a motion to suppress, the court is presented with mixed questions of law and fact. *People v. Pittman*, 211 Ill. 2d 502, 512 (2004). While the trial court's findings of fact will be upheld unless they are against the manifest weight of the evidence, the ultimate question of whether the evidence should be suppressed is reviewed *de novo*. *Pittman*, 211 Ill. 2d at 512. Our review includes not only the evidence presented at the motion to suppress hearing but the evidence presented at trial. *People v. DeLuna*, 334 Ill. App. 3d 1, 11 (2002).

¶ 92 B. Discussion

¶ 93 The admission of an involuntary confession into evidence violates both the federal and Illinois constitutions. *People v. Jones*, 2014 IL App (1st) 120927, ¶ 48; U.S. Const., amend.V, and Ill. Const. 1970, art. 1, § 10. The State must prove by a preponderance of the evidence that the defendant's confession was given voluntarily. *Jones*, 2014 IL App (1st) 120927, ¶ 48.

¶ 94 Determination of the voluntariness of a confession requires the court to consider the totality of the circumstances, including the following: the defendant's age, intelligence, experience, education, mental capacity, physical condition at the time of the questioning, the duration and legality of the detention, and whether there was any physical or mental abuse. *People v. Murdock*, 2012 IL 112362, ¶ 30. Threats or promises by the police may be considered physical or mental abuse. *Murdock*, 2012 IL 112362, ¶ 30. "No single factor is dispositive, rather, '[t]he test of voluntariness is whether the individual made his confession freely and voluntarily, without compulsion or inducement of any kind, or whether the individual's will was overcome at the time of the confession.' " *Murdock*, 2012 IL 112362, ¶ 30 (quoting *People v. Morgan*, 197 Ill. 2d 404, 437 (2001)).

¶ 95 The defendant argues that at the time of the statement to Detective Kimble, he was only 18 years-of-age, had never been charged with a criminal offense and never experienced a police interrogation. He further argues that he was in continuous custody for 37 hours prior to his statement and was not given his *Miranda* warnings prior to giving his statement. The defendant maintains that he was deprived of food, water and sleep. He further maintains that Detective Kimble misstated the amount of evidence against him, lied to him that he would be released if he confessed, threatened that the defendant's failure to confess would cause him harm in the future, caused him to feel guilty by mentioning the defendant's mother and repeatedly suggested that the defendant was tired of the victim's treatment of him.

¶ 96 The record does not support the defendant's arguments. The fact that the defendant was18 years old,[9] the age of majority in Illinois (755 ILCS 5/11-1 (West 2004)), favors a finding that his statement was voluntary. *People v. Primm*, 319 Ill. App. 3d 411, 419 (2000) (in determining the voluntariness of the confession, the court considered that at 16 years-of-age, the defendant had "nearly reached majority age"). While the defendant had never been charged with a criminal offense, he admitted selling drugs, and as the trial court observed, the defendant had "quite a bit of street sense and savvy." See *People v. Westmoreland*, 372 Ill. App. 3d 868, 878 (2011) (a defendant can compensate for his lack of experience with the criminal justice system with his natural gifts, such as intelligence, which can assist him in handling a novel situation). Moreover, at trial, the defendant testified that he had been taught not to trust the police, making it unlikely that his inexperience with a police interrogation would have prompted his statement to Detective Kimble.

[9]The defendant turned 18 on March 16, 2006.

¶ 97 We find no evidence that the defendant was deprived of food or water while he was held in custody. The defendant does not assert that his request for food or drink was denied or delayed until he confessed. The defendant's reliance on the detective's remark on his ability to sleep at night refers to the time following the victim's murder, not his stay in police custody.

¶ 98 The fact that the defendant was in custody for 37 hours prior to giving his statement does not render it involuntary or require its suppression. We have previously rejected the defendant's argument that his arrest for the victim's murder was illegal. The supreme court held that the detention of a defendant for 25 hours and then for 37 hours prior to his statements was "not such a great departure from established precedents that it requires suppression of defendant's statements." *People v. House*, 141 Ill. 2d 323, 379-80 (1990). In *People v. Nicholls*, 42 Ill. 2d 91 (1969), the court found a confession after 34 hours of detention voluntary where the defendant had proper sleep and food and was not questioned continuously. *Nicholls*, 42 Ill. 2d at 101. Likewise, in the present case, the defendant was not questioned continuously. The first period of interrogation was relatively brief, and the second was terminated because Detective Kimble was exhausted.

¶ 99 The defendant's claim that his statement resulted from Detective Kimble's lies, threats and promises is not borne out by the record. The record contradicts the defendant's claim that the detective offered to release him if he confessed. Detective Kimble told the defendant that by coming forward and explaining what happened, he could be home. When the detective's asked what the defendant wanted him to do for him, the defendant replied that the detective should let him go. Detective Kimble responded that he could not help the defendant unless the defendant was willing to help himself by telling what happened.

¶ 100 The defendant's confession to the victim's murder did not result from Detective Kimble's statements to him. The complained of statements were made in the second interview, during which the defendant chose to answer some questions but for the most part remained silent. It was only after second interview ended and the defendant was being returned to his cell, that he informed Officer Lockett that he wished to make a statement. It is significant that the defendant initiated the third interview. At trial the defendant testified that he initially denied his involvement in the victim's murder because he was not yet ready to come forward and did not trust Detective Kimble. Thus there is no basis for concluding that Detective Kimble's interview tactics coerced the defendant into confessing to shooting the victim.

¶ 101 Finally, the defendant maintains that he was not aware his statement could be used against him because he was not given *Miranda* warnings prior to giving his statement. As we already observed, the defendant instigated the third interview with Detective Kimble. Moreover, the failure to restate *Miranda* warnings before resuming the questioning of the defendant does not automatically invalidate his statements where he was adequately advised of his rights and freely waived them. *People v. Padilla*, 70 Ill. App. 3d 406, 412 (1979). The record shows that the defendant was given *Miranda* warnings at the commencement of the first and second interviews. The defendant signed a waiver of his rights and never denied that his waiver was freely given. In light of the defendant's acknowledgment that he was given *Miranda* warnings and waived his rights, we reject the defendant's argument that he was not aware his statement to Detective Kimble could be used against him.

¶ 102 We conclude that the defendant's statement to Detective Kimble admitting to shooting the victim was voluntary. The trial court did not err in denying the defendant's motion to suppress his statement.

¶ 103 III. Denial of Discovery Request

¶ 104 The defendant contends that the trial court erred when it refused to order the State to obtain the victim's arrest reports.

¶ 105 A. Standard of Review

¶ 106 A trial court's decision on whether to limit discovery is reviewed for an abuse of discretion. *People v. K.S.*, 387 Ill. App. 3d 570, 573 (2000). "An abuse of discretion will be found only where the trial court's ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court." *People v. Hall*, 195 Ill. 2d 1, 20 (2000).

¶ 107 B. Discussion

¶ 108 Defense counsel issued a subpoena to the Robbins police department for three arrest reports of the victim, on charges of battery and obstruction of justice. Counsel sought the reports to determine if they contained acts of violence on the part of the victim which would support the defendant's claim of self defense. See *People v. Lynch*, 104 Ill. 2d 194, 200-01(1984) (where self defense is raised, the victim's aggressive and violent character is relevant to show who was the aggressor). In response to the subpoena, defense counsel received a 2003 arrest for battery report but could not determine if the arrestee was the victim. Counsel issued a second subpoena to the Robbins police requesting a photograph of the arrestee, but the Robbins police failed to comply with the second subpoena.

¶ 109 Prior to trial, defense counsel requested that the State tender the two outstanding arrest reports and the additional information necessary to determine if the arrestee in the 2003 report was the victim. The trial court denied the request.

¶ 110 The defendant maintains that the trial court's refusal to order the State to obtain the victim's arrest records and the photograph was an abuse of discretion. The defendant argues that under Illinois Supreme Court Rule 412 (Ill. S. Ct. R. 412 (eff. March 1, 2001)) that the State was required to provide him with the arrest reports.

¶ 111 Rule 412 requires the State to disclose to defense counsel "any material or information within its possession or control which tends to negate the guilt of the accused as to the offense charged or which would tend to reduce his punishment therefor." Ill. S. Ct. R. 412 (c) (eff. March 1, 2001). Sections (f) and (g) of Rule 412, provide that the State should use good faith efforts to ensure the flow of information between it and other government personnel so that material that would be discoverable if it was in the State's possession or control is available to defense counsel upon request. Ill. S. Ct. R. 412 (f) (g) (eff. March 1, 2001); see *People v. Mahaffey*, 60 Ill. App. 3d 496, 502-03 (1978) (failure of police to disclose evidence to the State did not excuse the State's failure to provide that evidence to the defendant).

¶ 112 The defendant's motion did not allege that the arrest reports were within the State's "possession or control." None of the cases relied on by the defendant require the trial court to order the State to furnish the defendant with copies of the victim's arrest reports. Both *People ex rel. Fisher v. Carey*, 77 Ill. 2d 259 (1979), and *People v. Huntley*, 144 Ill. App. 3d 64 (1986) deal with Illinois Supreme Court Rule 411, (eff. March 1, 2001) (discovery rules are applicable to criminal cases following indictment or information, not prior to or in the course of a preliminary hearing). *Carey* held that, provided certain requirements were met, defense counsel may subpoena non-privileged police records prior to a preliminary hearing. *Carey*, 77 Ill. 2d at 268-69. Relying on *Carey*, the court in *Huntley* held that Rule 411 did

not authorize the trial court to order the State to produce a police report prior to the defendant's preliminary hearing. If the State did not comply with the request, defense counsel should have sought a *subpoena duces tecum*. *Huntley*, 144 Ill. App. 3d at 67.

¶ 113 This is not a case in which the State failed to disclose evidence favorable to the defendant. Defense counsel was aware of the existence of the arrest reports and acknowledged to the trial court that he could obtain the arrest reports via a subpoena. His difficulty was that the Robbins police would not comply with his subpoena. As the trial court pointed out, defense counsel could have filed a rule to show cause against the Robbins police department for failing to comply with the subpoenas, but he had not done so. While denying the motion to compel the State to obtain the victim's arrest records, the trial court instructed defense counsel to issue another subpoena and return to court if the Robbins police department failed to comply with that subpoena.

¶ 114 We find no abuse of discretion by the trial court when it refused to order the State to obtain the victim's arrest reports and the photograph.

¶ 115 In the alternative, the defendant contends that defense counsel's failure to issue a subpoena for the victim's arrest reports to the Robbins police department after the trial court denied his motion, denied him the effective assistance of counsel. Defense counsel informed the court that he was not seeking to enter the arrest reports into evidence. He only wished to review the reports to determine if they contained information supportive of the defendant's claim of self defense. Absent from the record is any evidence as to whether defense counsel issued another subpoena.

¶ 116 We do not reach the claim of ineffectiveness of defense counsel. We cannot assume that defense counsel failed to file another subpoena to the Robbins police, or if he did, that he

obtained any information to support the self-defense theory. Defense counsel's actions are *de hors* the record. Where the information not of record is critical to a defendant's claim of ineffective assistance of counsel, the claim is not proper on direct appeal but must be raised in a collateral proceeding. *People v. Richardson*, 401 Ill. App. 3d 45, 48 (2010).

¶ 117 IV. Exclusion of *Lynch* Evidence

¶ 118 The defendant contends that the trial court erred when it barred evidence supportive of his claim of self defense.

¶ 119 A. Standard of Review

¶ 120 "A trial court's ruling regarding relevance and admissibility of evidence will not be reversed absent an abuse of discretion and manifest prejudice." *People v. Figueroa*, 381 Ill. App. 3d 828, 841 (2008).

¶ 121 B. Discussion

¶ 122 "[W]hen self-defense 'is properly raised, evidence of the victim's aggressive and violent character may be offered for two reasons: (1) to show that the defendant's knowledge of the victim's violent tendencies affected [his] perceptions of and reactions to the victim's behavior; and (2) to support the defendant's version of the facts where there are conflicting accounts of what happened.' " *Figueroa*, 381 Ill. App. 3d at 841 (quoting *People v. Nun*, 357 Ill. App. 3d 625, 631 (2005) (reviewing and summarizing the holding in *Lynch*). The second *Lynch* approach requires conflicting accounts of what occurred in order for the evidence to be admissible. *Figueroa*, 381 Ill. App. 3d at 841-42. Since the defendant's version is the sole account of the shooting, only the first *Lynch* approach applies in this case.

¶ 123 Prior to trial, defendant requested a ruling on the admissibility of evidence he wished to present pursuant to *Lynch*. Specifically, the defendant sought to admit evidence that in 2005,

he was present when the victim pointed a gun at the head of Tika Hampton, a teenager, simply because she was walking past him. The defendant also sought the admission of evidence that 20 minutes prior to the shooting, he witnessed the victim point a gun at an individual known as "White Boy" and take his money. The trial court ruled that the defendant could testify as to the "White Boy" incident, but denied admission of the incident involving Ms. Hampton.

¶ 124 In denying admission of the incident with Ms. Hampton, the trial court noted that it had no information as to the date the incident occurred other than mid-2005. There were no police reports of the incident, and there were no affidavits from either Ms. Hampton or the defendant about the incident. The court then stated as follows:

> "One thing this Court must consider is the reliability of this testimony before ruling and letting this testimony be put before any trier of fact, I must consider any reliability and whether or not this is credible evidence that can be shown to the trier of fact that the victim, in fact, performed these acts. There has been nothing submitted to this Court to give me any reliability that this incident in mid-2005 occurred.
>
> I would certainly need more evidence to find that this is reliable evidence with regards to the pointing of a weapon at the head of Tika, T-i-k-a, Hampton in the middle of 2005. That has not been submitted to this Court; therefore, your motion to allow that evidence is going to be denied."

¶ 125 A trial court may reject even relevant evidence if it is remote, uncertain or speculative. *Figueroa*, 381 Ill. App. 3d at 840-41. Evidence of a victim's aggressive and violent behavior must be reliable. *People v. Ciavirelli*, 262 Ill. App. 3d 966, 971 (1994). In this case, the trial court found the evidence of the victim's violent act towards Ms. Hampton

unreliable in the absence of some confirmation that she in fact would testify that the victim held a gun to her head for no reason. The defendant argues that the trial court should have accepted defense counsel's representation as to what her testimony would be. While Ms. Hampton's name appears on the list of defense witnesses, her address was said to be unknown. Defense counsel never stated that he had spoken to Ms. Hampton to confirm the defendant's description of her encounter with the victim. Other than an allegation that the incident occurred sometime in mid-2005, there was no information about when this incident occurred.

¶ 126 The trial court ruled that it needed more proof of reliability before it would consider admitting the victim's encounter with Ms. Hampton as evidence of his violent behavior, leaving the door open for additional evidence to be presented. See *People v. Booker*, 274 Ill. App. 3d 168, 173 (1995) (the trial court's ruling prevented counsel from discussing reputation evidence in opening statement, but the ruling did not preclude the defendant from offering such evidence if during trial, he could offer more than a vague basis for such evidence). In the present case, no further proof of the reliability of the proposed evidence was presented by the defendant.

¶ 127 Under the circumstances, we cannot find that the trial court's denial of the admission of the incident with Ms. Hampton as evidence of the victim's violent and aggressive behavior was an abuse of discretion.

¶ 128 V. Confrontation Clause Violation

¶ 129 The defendant contends that the admission of Mr. McDowell's statement violated the confrontation clause under *Crawford v. Washington*, 541 U.S. 36 (2004), and *Bruton v. United States*, 391 U.S. 123 (1968), depriving him of a fair trial. The State responds that the

statement was non-testimonial, the trial court gave a limiting instruction to the jury, and ultimately, any error in the admission of the statement was harmless error.

¶ 130 A. Standard of Review

¶ 131 Whether an individual's constitutional rights have been violated is reviewed *de novo*. *In re Angel P.*, 2014 IL App (1st) 121749, ¶ 36.

¶ 132 B. Discussion

¶ 133 The confrontation clause contained in the sixth amendment provides that, " '[i]n all criminal prosecutions, the accused shall enjoy the right *** to be confronted with the witnesses against him.' " *People v. Duff*, 374 Ill. App. 3d 599, 603 (2007) (quoting U.S. Const., amend. VI). The confrontation clause bars the admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination. *Duff*, 374 Ill. App. 3d at 603 (citing *Crawford*, 541 U.S. at 68. Statements made during police questioning, including accomplice statements and statements against penal interest, are testimonial statements. *Duff*, 374 Ill. App. 3d at 603 (citing *Crawford*, 541 U.S. at 68). "In *Bruton*, the Supreme Court ruled that the admission at joint trial of a statement by a nontestifying codefendant which expressly implicates defendant in the crime violates the defendant's constitutional right to confront witnesses against him." *People v. Williams*, 182 Ill. 2d 171, 184-85 (1998) (citing *Bruton*, 391 U.S. at 137).

¶ 134 Prior to trial, the trial court ordered the State to redact from the defendant's interview with Detective Kimble any references to statements by Mr. McDowell concerning the defendant's shooting of the victim. Finding these statements to be highly prejudicial to the defendant, the court stated:

"I severed these trials and limiting instruction will not cure that, and that will not be presented to the trier of fact. That is prejudicial and that is the Court's ruling with regards to any statements that the co-defendant [Mr. McDowell] made concerning, who shot [the victim]. "

¶ 135 Defense counsel reviewed the redacted transcription and, in accordance with the trial court's direction, counsel moved to have the following portion redacted from the transcription of the interview:

"[The defendant]: But [Mr. McDowell] said I had both of the guns?

[Detective Kimble]: He didn't say it. He wasn't the only one that said it.

[The defendant]: But he said it though?

[Detective Kimble]: One of the people who said it."

¶ 136 The trial court denied the motion finding that the statement was not prejudicial. The court pointed out that it was the defendant who asked the question and found that the evidence was probative.

¶ 137 Prior to the jury's viewing of the videotape, the trial court instructed the jury that portions of the videotape had been redacted and that they were not to speculate about the reasons for the redactions. The court further instructed the jury that Detective Kimble's references to conversations with other individuals were to be considered not for the truth of the statements but only to show how those conversations affected the defendant.

¶ 138 The defendant relies on *Williams*. In that case, the defendant and Michael Coleman, a codefendant, were tried jointly. Witnesses testified that Mr. Coleman had described the murder of the victims to them but did not identify the defendant by name. In ordering a new trial for the defendant, the supreme court reiterated its holding that a substitution for the

defendant's name did not cure a *Bruton* error where the substituted term plainly identified the defendant. *Williams*, 182 Ill. 2d at 187. While the trial court gave a limiting instruction as to the use of the testimony, the instruction was not given to the jury until the day after the witnesses had testified. Moreover, any benefit of the limiting instruction was negated by the prosecutor's closing argument which in effect encouraged the jury to use the codefendant's statements in evaluating the case against the defendant. *Williams*, 182 Ill. 2d at 191 (the prosecutor's arguments were an unconstitutional attempt to circumvent the confrontation clause and the strictures of *Bruton*).

¶ 139 The defendant also relies on *People v. Johnson*, 116 Ill. 2d 13 (1987). In *Johnson*, the defendant's jury trial was severed from those of his three codefendants. The jury heard the testimony of the statements two of the nontestifying codefendants made to police. In remanding for a new trial, the supreme court found that the State's use of the testimony as substantive evidence of the defendant's guilt belied the argument that the testimony had a non-hearsay use at trial. *Johnson*, 116 Ill. 2d at 27-28.

¶ 140 In both *Williams* and *Johnson*, the supreme court rejected the State's argument that the confrontation violation was harmless error. See *Williams*, 182 Ill. 2d at 191-92 (the error was not harmless where the case against the defendant was largely circumstantial). In *Johnson*, in determining that the confrontation violation was not harmless error, the court pointed out that the error was repeated in closing argument rather than isolated, the defendant had not confessed, and there was no physical evidence connecting him to the crime. Moreover, testimony by the victim's mother and one of the accomplices that the defendant fired the fatal shot was controverted in several respects. The nontestifying codefendants' statements went to the central issue in the case – whether the defendant was the gunman. Therefore, the error

in presenting the testimony, which was hearsay, as substantive evidence of defendant's guilt was not harmless beyond a reasonable doubt. *Johnson*, 116 Ill. 2d at 28-29.

¶ 141 The present case is distinguishable from the cases relied on by the defendant. Unlike *Bruton* and *Williams*, the defendant's case was severed from that of his codefendant, Mr. McDowell. Unlike *Williams*, prior to viewing the videotape of the defendant's interview with Detective Kimble, the jury was instructed to disregard any reference by Detective Kimble during the interrogation interview to other individuals' statements. The defendant argues that under *Bruton*, a limiting instruction is not enough to eliminate the prejudice to a defendant. However, what the Supreme Court stated in *Bruton* was "in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner's constitutional right of cross-examination." *Bruton*, 391 U.S. at 137. Moreover, unlike *Williams* and *Johnson*, in the present case, the prosecutor did not make use of Mr. McDowell's statement in closing argument or argue that the statement was substantive evidence against the defendant which would have negated the purpose of the limiting instruction. *Williams*, 182 Ill. 2d at 191. Unlike *Johnson*, the defendant confessed to shooting the victim and testified that he had shot the victim.

¶ 142 Any error in allowing the jury to hear Detective Kimble's reference to Mr. McDowell's statement about the defendant having two guns was harmless beyond a reasonable doubt. *People v. Patterson*, 217 Ill. 2d 407, 428 (2005) (*Crawford* violations are subject to the harmless error analysis). In measuring error under the harmless-constitutional-error test, the reviewing court: (1) focuses on the error to determine if it might have contributed to the conviction; (2) examines other evidence in the case to see if the conviction is supported by

overwhelming evidence; and (3) determines if the improperly admitted evidence is merely cumulative or duplicates properly admitted evidence. *Duff*, 374 Ill. App. 3d at 604-05.

¶ 143 Using the factors in the above analysis, the error was harmless. The reference to Mr. McDowell's statement about the defendant possessing two guns was brief. The defendant's confession was properly admitted. In both his confession and his testimony at trial, he admitted he possessed a gun when he got into the victim's car and subsequently shot the victim. Together with the other evidence confirming the circumstances surrounding the victim's death and its cause, the evidence, if not overwhelming, was more than sufficient to support the defendant's first degree murder conviction. We are satisfied that any error in not redacting Mr. McDowell's statement from the videotape did not contribute to the defendant's conviction.

¶ 144 We conclude that the defendant's rights under the confrontation clause were not violated. Error, if any, was harmless beyond a reasonable doubt.

¶ 145 VI. Admission of the Transcript of the Interrogation Interview

¶ 146 The defendant contends that the trial court committed reversible error when it admitted the transcript of the interrogation interview prepared by the State into evidence and then allowed the jury to have the transcript without the videotape of the interrogation interview during deliberations. He argues that the transcript contained references to inadmissible statements by Mr. McDowell and omitted statements by the defendant supporting the defense theory.

¶ 147 A. Standard of Review

¶ 148 The court reviews the admission of evidence for an abuse of the trial court's discretion. *People v. Manning*, 182 Ill. 2d 193, 211 (1998). A trial court's ruling as to whether evidence

should be sent back to the jury during deliberations is reviewed for an abuse of discretion. *People v. Hunley*, 313 Ill. App. 3d 16, 38 (2000).

¶ 149 B. Discussion

¶ 150 We have already addressed the error relating to Mr. McDowell's reference to the defendant on the videotape. The defendant maintains that the transcript of the videotape was inaccurate and lacked the proper foundation for its admission into evidence. The defendant further maintains that allowing the jury to have the transcript without the videotape and without an instruction to the jury as to the use of the transcript requires that he receive a new trial.

¶ 151 Prior to trial, defense counsel filed a motion pointing out what he termed were "inaccuracies" within the transcript. The claimed inaccuracies were for the most part disagreements between the State and the defendant as to a specific word that was said on the videotape. The defendant focused primarily on portions of the videotape which were noted on the transcript as "inaudible." In particular, the portion where the defendant explained to Detective Kimble why he shot the victim.

¶ 152 At the hearing on the motion, the following colloquy occurred:

"THE COURT: I am just looking at it now.

Are you talking about just a word here or there or substantive things that change the - - what your client is saying?

MR. GOLDSTEIN: Well, the most important one, if I were to rank it, *** the original transcript says, 'So' - - and this is [the defendant] speaking, 'So I just thought he was going to,' and then it says 'inaudible.'

> And listening to the tape, I believe that it says, 'So I thought that he was going to kill me.' That is substantive. The issue is self-defense.
>
> THE COURT: If it says 'inaudible,' then that means - - it doesn't mean that - - it doesn't mean that he didn't say it. It just means that whoever typed this found it inaudible, or they weren't able to articulate exactly what was said. But the jury will hear it, and they can determine what was said.
>
> ***
>
> If you lay a proper foundation, I can certainly give the jury an admonishment that this is a transcript of the proceedings, but it is for them to determine the accuracy of that transcript."

¶ 153 The defendant argues that the State failed to lay a proper foundation for the admission of the transcript into evidence. The State responds that the defendant never raised a lack of foundation objection to the admission of the transcript into evidence. We disagree. Prior to trial, defense counsel objected to the admission of the transcript, arguing that it was inaccurate and stating, "[w]hat we have here is an uncertified transcript done by the State's Attorney's Office. They weren't present." At the instructions conference, defense counsel disagreed with the trial court that there was an adequate foundation establishing that the transcript was accurate, stating, "[t]he individual that transcribed this did not come in here and say this was accurate. There is no certification this is accurate." Finally, the lack of foundation error was raised in the defendant's posttrial motion. We agree with the defendant that foundation error was preserved for appeal.

¶ 154 "A transcript may be admitted into evidence if the party offering it lays a sufficient foundation that establishes the accuracy of the transcript and the identity of the speakers."

Hunley, 313 Ill. App. 3d at 37. We disagree with the defendant that the transcript contained "inaccuracies." Rather, there were disagreements as to certain words, none of which reflected a completely different meaning than what defense counsel maintained was said on the videotape. Moreover, the "inaudible" portions do not constitute an "inaccuracy." The transcriber did not substitute words or phrases that were not in the videotape. See *People v. Melchor*, 136 Ill. App. 3d 708 (1985) (the State's transcript of the audio tape identified the speakers, who were not identified on the audio tape). The transcript reflected only that the transcriber could not detect from the audio portion of the video what was said. Therefore, we reject the defendant's argument that the transcript contained inaccuracies.

¶ 155 The defendant argues that the State failed to lay the proper foundation because the person who prepared the transcript was not called to testify. The defendant's reliance on *Melchor* is misplaced. Reversing the defendant's conviction, the reviewing court found that, in the absence of evidence as to who prepared the transcript or who decided which statements should be attributed to the defendant and that no one vouched for the accuracy of the transcript, the foundation for identifying the defendant in a transcript was lacking. *Melchor*, 136 Ill. App. 3d at 713. In the present case, the defendant's identity on the videotape is not in dispute, and no words were added to the inaudible portions of the transcript.

¶ 156 The defendant relies on *People v. Criss*, 307 Ill. App. 3d 888 (1999). In determining that the transcripts of the audio recordings were admissible, the reviewing court noted a proper foundation was laid for the admission of the tape-recording and the transcript where the police officer testified that she was present during the conversations that were recorded and personally transcribed the tapes. *Criss*, 307 Ill. App. 3d at 900-01. We do not conclude from *Criss* that only the person who transcribed the videotape can establish its accuracy.

¶ 157 While Detective Kimble did not transcribe the videotape, he was present during the interrogation interviews and testified as to the accuracy of the transcript prepared from videotape. The detective testified that he had reviewed the transcript of the interrogation video and compared it to the DVD created from the video. He stated that it appeared to be a fair and accurate copy of the interview. The defendant points out that the detective's testimony about the accuracy of the transcript was less than positive. However, in his testimony concerning his interview with Mr. McDowell, wherein he showed the defendant's interrogation videotape to Mr. McDowell, Detective Kimble testified that the video and the transcript fairly and accurately depicted what occurred in his interview with the defendant.

¶ 158 Detective Kimble's testimony established the accuracy of the transcript of the videotape and there was no dispute as to the defendant's identity on the videotape. Therefore a sufficient foundation was established for the admission of the transcript into evidence.

¶ 159 The defendant maintains that it was reversible error for the trial court to send the transcript to the jury without the videotape and without instructing the jury as to the use of the transcript. While the trial court did order that the videotape be available to the jurors if they wished to view it again during deliberations, the jury was not given an instruction as to the use of the transcript.

¶ 160 The defendant maintains that on the videotape he could be heard telling Detective Kimble that he did not want to get into the car with the victim because he thought that the victim was going to kill him. The State's transcription of the tape provides that the defendant, "just thought [the victim] was gonna (inaudible)." The defendant argues that the jury would find his testimony that he thought the victim was going to kill him self-serving, and therefore, it was necessary for the trial court to instruct the jury that if there was a conflict, the videotape

controlled over the transcript. See *Criss*, 307 Ill. App. 3d at 901 (in cases where transcripts are sent to the jury room, the trial courts instruct the jury that if a juror's understanding of the tape diverged from the transcript, the juror's own interpretation of the tape controls).

¶ 161 The trial court recognized that it was for the jury to determine if there was a conflict between the transcript and the interrogation videotape. The court then stated as follows:

> "However, I will instruct this jury when they are going back to the jury room with the evidence that if they wish to see anything concerning this tape recording that they are to let the deputy sheriffs know.
>
> They will be brought back into the courtroom, and they will be allowed to watch whatever they wish to watch since this tape recording has been admitted into evidence.
>
> I will notify them that it will not be going back but it is clearly available if they wish to watch the video again or portions of it."

¶ 162 The jury viewed the video and heard the other portions of the video where the defendant could be heard recounting several incidents to Detective Kimble to explain why he was afraid of the victim. The defendant testified at trial that he was scared that the victim was going to kill him as they rode in the car together. When asked by defense counsel what he said where the tape was "inaudible," the defendant maintained that he said to Detective Kimble, "I just thought he was going to kill me." The trial court did not refuse to make the videotape available to the jury during deliberations. It was strictly a logistics problem that prevented the jury from being able to view the videotape in the jury room itself.

¶ 163 It is within the trial court's discretion which evidence should be used by the jury during deliberations. *Hunley*, 313 Ill. App. 3d at 38. Even without the cautionary instruction as to

the use of the transcript, we conclude that the trial court did not abuse its discretion by allowing the jury to have the transcript during deliberations, with the videotape available to them, rather than in the jury room itself.

¶ 164 VII. Jury Instruction

¶ 165 The defendant contends that the trial court erred when it denied defense counsel's request to give the jury Illinois Pattern Jury Instructions, Criminal, No. 3.20 (4th ed. 2011) (hereinafter, IPI Criminal 4th No. 3.20), which provides for the use of transcripts of tape-recorded conversations).

¶ 166 A. Standard or Review

¶ 167 A trial court's ruling on which jury instructions are to be given is reviewed for an abuse of discretion. *People v. Rodriguez*, 387 Ill. App. 3d 812, 821 (2008).

¶ 168 B. Discussion

¶ 169 At the jury instructions conference, defense counsel requested that the jury receive IPI Criminal 4th No. 3.20, which states as follows:

> "A tape-recording has been admitted into evidence. In addition to the tape-recording you are being given a transcript of the tape-recording. The transcript only represents what the transcriber believes was said on the tape, and merely serves as an aid when you listen to the tape. The tape and not the transcript is the evidence. If you perceive a conflict between the tape and the transcript, the tape controls." IPI Criminal 4th No. 3.20.

¶ 170 The trial court denied defense counsel's request to give IPI Criminal 4th No. 3.20.[10] The court pointed out that the committee note to the instruction "talks about giving this instruction concerning the hearing of a tape recording and not a visual recording." Therefore, the court concluded that the instruction did not apply to a visual recording, where both the recording and the transcript were admitted into evidence.

¶ 171 We disagree. The videotape admitted into evidence allowed the jury to see and hear the defendant confessing to Detective Kimble. Nothing in the IPI Criminal 4th No. 3.20 or the committee notes limits its use to tape-recordings without a visual recording. Moreover, the fact that the transcript was also admitted into evidence does not bar the use of the instruction. The committee note to IPI Criminal 4th No. 3.20 provides that the jury should be instructed on the role of tape-recordings and transcripts and cites *Hunley* and *Criss*. As in the present case, in *Criss*, the transcript was admitted into evidence. *Criss*, 307 Ill. App. 3d at 901. We agree with the defendant that the trial court erred when it denied the defense request to give the jury IPI Criminal 4th No. 3.20.

¶ 172 The State argues that the failure to give the jury IPI Criminal 4th No. 3.20 does not require a new trial because the error did not prejudice the defendant. "An instructional error will be harmless beyond a reasonable doubt where the evidence in support of the verdict is so clear and convincing that the verdict would not have been different had the jury been properly instructed." *People v. Cook*, 2014 IL App (1st) 113079, ¶ 32. The transcript given to the jury indicated that there were inaudible gaps during the defendant's interrogation by Detective Kimble. The jury viewed the videotape during the trial. In his testimony, the

[10] As of October 2014, the instruction was modified to apply to the use of all electronic recording devices.

defendant explained that in an inaudible gap on the video-recording, he stated to Detective Kimble that he thought the victim was going to kill him. The State did not dispute what the defendant maintained he said to the detective. Finally, the trial court instructed the jury that the videotape was available for viewing during their deliberations.

¶ 173 While it would be better practice to instruct the jury on the use of the transcript in conjunction with the videotape, in the present case, we are satisfied that had the jury received IPI Criminal 4th No. 3.20, the verdict would not have been different. Therefore, error was harmless beyond a reasonable doubt and does not require reversal of the defendant's conviction and a new trial.

¶ 174 VIII. Trial Court's Comment

¶ 175 The defendant contends that the trial court's instruction to the jury to disregard a portion of the defendant's testimony denied him a fair trial. The State objected to defendant's testimony about another murder allegedly committed by the victim as outside of the *Lynch* material the trial court ruled the defendant could introduce. The trial court instructed the jury as follows:

> "The Court makes the finding that this testimony is not reliable to be put before you and that is this: There is some testimony concerning a person by the name of Dave Hawthorne stating that [the victim] committed a prior murder. I am asking you to disregard that testimony, and it will be stricken."

¶ 176 The defendant acknowledges that while he raised the error in his posttrial motion, he failed to preserve the issue on appeal because he failed to object at trial to the trial court's instruction to the jury. However, the application of the waiver or forfeiture rule is relaxed

where the trial judge's conduct would have been the basis for the objection. *People v. Burgess*, 2015 IL App (1st) 130657, ¶ 157.

¶ 177 A. Standard of Review

¶ 178 A trial judge's improper comments will constitute reversible error only if the remarks were prejudicial and the defendant was harmed by the comments. *People v. Tatum*, 389 Ill. App. 3d 656, 662 (2009).

¶ 179 B. Discussion

¶ 180 "The trial judge has wide discretion in presiding over a trial, but cannot make comments or insinuations indicating its opinion on the credibility of a witness or the argument of counsel." *Tatum*, 389 Ill. App. 3d at 662. The trial court has a duty to see that the defendant is provided with a fair trial, and where judicial comments are shown to be a material factor in the conviction or the jury's verdict was the result of the comments, the comments can amount to reversible error. *Burgess*, 2015 IL App (1st) 130657, ¶ 170.

¶ 181 The defendant argues that the trial court's instruction in effect told the jury that the defendant's testimony was "unreliable," misleading and inaccurate. He maintains that the jury would have understood the trial court to mean that the defendant's testimony in its entirety was unreliable.

¶ 182 The record does not support the defendant's claim. The trial court's instruction to the jury clearly confined the finding of unreliability to the portion of the defendant's testimony that violated the court's ruling as to the introduction of *Lynch* material, not the defendant's entire testimony. There is no basis in the record for concluding that the trial court's instruction denied the defendant a fair trial or contributed to his conviction in this case.

¶ 183 IX. Closing Arguments

¶ 184 The defendant contends that he was denied a fair trial by statements made by the prosecutors in closing and rebuttal arguments. He argues that the arguments were so prejudicial that a new trial is required.

¶ 185 A. Standard of Review

¶ 186 The defendant maintains that the applicable standard of review is *de novo*, relying on *People v. Wheeler*, 226 Ill. 2d 92, 121 (2010); but see *People v. Blue*, 189 Ill. 2d 99,128 (2000) (the prosecutor's remarks were reviewed under the abuse of discretion standard). This apparent conflict in the applicable standard of review has not yet been addressed by our supreme court. Until the conflict is resolved, we decline to determine the applicable standard of review where the result would be the same under either standard of review. *People v. Anderson*, 407 Ill. App. 3d 662, 675-76 (2011).

¶ 187 B. Discussion

¶ 188 1. *Alleged Improper Arguments*

¶ 189 In support of his contention, the defendant claims that the following portions of the prosecutors' closing and rebuttal arguments were improper and denied him a fair trial.

¶ 190 The prosecutor encouraged the jury to hold his decision to testify against him.

> "Self-defense is an honorable thing. It's an honorable thing. That person was going to kill my baby, and I defended her. I would never, ever be scared to say that I did what I had to do. That person was coming at me with a knife. I did what I had to do to preserve my life."

¶ 191 Next, during rebuttal, the prosecutor tried to align the State with the jury.

> We stand for you. The judge stands for you. You all are standing while we are standing. And she told you go ahead, sit down. We stand for you.

We are not here to put a burden on you. We are just asking you to be a delivery service.

And the reason we stand for you is because what you are delivering is on behalf of the defendant. It's on behalf of the community. It's on behalf of the victim. You are delivering justice."

¶ 192 Next, the prosecutor argued improperly that the trial court had found the defendant to be an unreliable witness.

"After you heard [the] defense opening and then you heard the defendant's direct, you were to think [the victim] committed multiple murders. This guy killed multiple people.

And then there's this cute name given – Charles Manson – for a gun. A kid his age is going to give a gun – Charles Manson – for a young kid from Robbins to attach to a gun.

That's his words telling you what [the victim] calls his gun. It doesn't really matter because it's gotten to the point where it's unreliable.

You remember when the defendant got up there and tried to tell you about Dave Hawthorne saw [the victim] commit murder? It got so bad that the judge came out here and told you it is unreliable.

I ask you to disregard it, because what Dave Hawthorne said about [the victim] committing a murder was unreliable."

¶ 193 Next, the prosecutor misstated the State's burden of proof.

> "But as to this, as to second degree murder, the burden doesn't exist at that table. There is no burden over at that table. We don't have a burden to prove anything with second degree. They do."

¶ 194 Next, the prosecutor disparaged and misstated the defendant's theory of self-defense. The prosecutor argued that the defendant's self-defense theory was "just a silly excuse for cold-blooded murder," encouraging the jury to "[c]all it for what it is." The prosecutor further argued:

> "This defendant at that time or anytime doesn't believe for one second that there was self-defense in any manner, any form, be it reasonable self-defense, be it unreasonable self-defense. That never entered his mind."

In rebuttal, the prosecutor called into question defense counsel's conduct, accusing defense counsel of insulting the jury's intelligence by raising such a defense; "[i]t assumes you have none" but that the State chose the jurors because they were "smart," fair," and because "you listen."

¶ 195 Next, the prosecutor misstated facts. The prosecutor stated that the defendant beat up the victim, whereas the defendant's statement was that he threatened to beat up Pock, the victim's brother, after Pock stole money and drugs from the defendant. The prosecutor also argued that the defendant never explained why he got into the victim's car, whereas, the defendant explained that he felt pressured by the victim.

¶ 196 Finally, the prosecutors' references to the defendant as "Killer," and as an "orphan who killed his parents" were designed to appeal to the passions of the jury.

> "[The victim] let those two inside of his car *** let Killer over here in the back of his car ***."

"That's not really in contravention because Killer over there is the one that pulled the trigger. Killer is the one that pulled the trigger twice, put two bullets in the head."

"And the details, it's amazing. It's amazing what he knows. He knows that the victim thought they were going to buy drugs. Who would have known that? [The victim] knows that, but he is dead. He can't come in and tell you obviously.

Killer over here, he knows that."

'How did Gregory Enge know this? Because he talked to him *** He knows from the killer's mouth, words closer to the time of the crime."

And it's Killer pointing to the victim and saying, well, he was a killer."

"But when [the defendant] is here somber, reflective, talking about curling up in a ball like it's such a bad event, it sort of reminds you of the orphans that are crying, want you to feel bad because they are orphans, but they killed his parents. This is Killer over here. He is the one who did this."

"[The defendant] didn't do anything besides explain how much of a cold-blooded killer he actually is."

¶ 197 2. *Forfeiture*

¶ 198 The defendant acknowledges that defense counsel did not object to the prosecutors' arguments he now raises on appeal. Since both a timely objection and inclusion in the defendant's posttrial motion are required to preserve the error for appellate review, the defendant has forfeited this issue. *People v. Cosmano*, 2011 IL App (1st) 101196, ¶ 54. Nonetheless, he maintains that since counsel did object throughout to the prosecutors' arguments and raised those arguments as error in his posttrial motion, the error was preserved for review. He relies on *Wheeler*, wherein our supreme court stated that the fact that the

defendant did not properly object to statements did not render those statements as if they never existed. They must be considered as part of the entirety of a prosecutor's closing argument as they might add context to a remark to which a proper objection was made. *Wheeler*, 226 Ill. 2d at 123. Nonetheless, the court's focus remained on the statements preserved for appeal by a proper objection. *Wheeler*, 226 Ill. 2d at 122. In this case, none of the statements challenged on appeal were objected to and, therefore, the error is forfeited.

¶ 199 The defendant seeks to avoid the consequences of forfeiture by requesting we review the prosecutors' arguments for plain error or, in the alternative, ineffective assistance of counsel.

¶ 200 2. *Plain Error*

¶ 201 The plain error doctrine allows this court to consider forfeited errors where (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious regardless of the closeness of the evidence. *Cosmano*, 2011 IL App (1st) 101196, ¶ 54. The first step in a plain-error analysis is whether error occurred. *People v. Span*, 2011 IL App (1st) 083037, ¶ 73.

¶ 202 Improper arguments are not reversible error unless they are a material factor in the defendant's conviction or cause substantial prejudice to the defendant. *People v. Meeks*, 382 Ill. App. 3d 81, 84 (2008). The arguments of both the prosecutor and defense counsel must be reviewed in their entirety and the allegations placed in their proper context.

¶ 203 In examining several of the arguments complained of, a review of the record reveals that the prosecutor's statements surrounding the complained of remark demonstrate that the argument was not improper. For example, the argument that the prosecutor tried to align the State with the jury by stating that "We stand for you." The prosecutor was referring to the fact that the trial court and the parties stood up when the jury entered or left the court room

out of respect for the jury. The prosecutor's remark that the defendant's testimony was unreliable was directed only at the defendant's reference to what Mr. Hawthorne told him about a murder allegedly committed by the victim. The prosecutors' did not misstate the burden of proof. Immediately prior to the reference to second degree murder, the prosecutor had informed the jury that the State had the burden to prove first degree murder and that the burden then shifted to the defendant to prove that a mitigating factor existed for a finding of the lesser charge of second degree murder. While the prosecutor made multiple references to the defendant as "Killer," the term was a reasonable inference from the record where the defendant admitted that he shot the victim.

¶ 204 Even if the remaining arguments were improper, where as in this case, the trial court instructed the jury that opening and closing arguments were not evidence and that counsel's arguments not based on the evidence or reasonable inferences from the evidence should be disregarded, a new trial is not required. *People v. Perry*, 224 Ill. 2d 312, 348 (2007). Contrary to the defendant's assertion, the evidence in this case was not closely balanced and any error in closing argument did not affect the outcome of the trial. Therefore, the defendant cannot establish plain error under the first prong of the plain-error analysis.

¶ 205 An error under the second prong of the plain error analysis "has been equated with structural error." *Cosmano*, 2011 IL App (1st) 101196, ¶ 78. "Structural errors have been recognized in only a limited class of cases including: a complete denial of counsel; trial before a biased judge; racial discrimination in the selection of a grand jury; denial of self-representation at trial; denial of a public trial; and a defective reasonable doubt instruction." *Cosmano*, 2011 IL App (1st) 101196, ¶ 78. The defendant cannot establish plain error under the second prong because an error in closing argument is not a structural error. *Cosmano*,

2011 IL App (1st) 101196, ¶ 78; but see *People v. Linscott*, 142 Ill. 2d 22 (1991) (the supreme court applied plain error where error in the closing argument was so substantial as to deprive the defendant of a fair trial). We are satisfied that the prosecutors' arguments did not deprive this defendant of a fair trial.

¶ 206 3. *Ineffective Assistance of Counsel*

¶ 207 The defendant argues that the failure to object to the prosecutors' arguments denied him the effective assistance of counsel.

¶ 208 We analyze claims of ineffective assistance of counsel under the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). To prevail on an ineffective assistance of counsel claim, the defendant must demonstrate that counsel's performance was deficient and that, but for counsel's deficient performance, it is plausible that the outcome of the trial would have been different. *People v. Fillyaw*, 409 Ill. App. 3d 302, 311-12 (2011). Where the claimed errors could not have prejudiced the defendant, we may affirm the conviction on that basis alone. *Fillyaw*, 409 Ill. App. 3d at 312; *Strickland*, 466 U.S. at 697.

¶ 209 Other than citing *Strickland*, the defendant provides no analysis or argument pertaining to why defense counsel's failure to object to statements now raised on appeal rendered him ineffective, either by demonstrating the existence of error or its prejudicial effect. Recently, in *People v. Macias*, 2015 IL App (1st) 132039, this court found that the defendant had waived a claim of ineffective assistance of counsel where he failed to offer any argument or case authority as required by the rules governing appeals. *Macias*, 2015 IL App (1st) 132039, ¶ 112; see Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008).

¶ 210 The defendant cites two other cases, *People v. Emerson*, 122 Ill. 2d 411 (1987) for the proposition that the court will consider issues otherwise waived if the waiver was caused by

defense counsel's failure to object, and *People v. Rogers*, 172 Ill. App. 3d 471 (1988), where defense counsel's failure to object to improper closing argument constituted ineffective assistance. Other than cite to these cases and their holdings, the defendant failed to develop any analysis or argument in support of his ineffectiveness of counsel claim. See *People v. Haissig*, 2012 IL App (2d) 110726, ¶ 17 (appellate argument was forfeited for lack of development where the defendants cited a proposition from an abstract opinion without attaching the case in violation of appellate rules and without articulating an argument in violation of Rule 341(h)(7)); see also *In re Detention of Lieberman*, 379 Ill. App. 3d 585, 610 (2007) ("An issue not clearly defined and sufficiently presented fails to satisfy the requirements of [Rule 341(h)(7)] and is, therefor, waived"); *Wolfe v. Menard Inc.*, 364 Ill. App. 3d 338, 348 (2006) ("A conclusory assertion, without supporting analysis is not enough" to constitute an argument under Rule 341(h)(7)). We conclude that the defendant forfeited his ineffective assistance of counsel argument with respect to defense counsel's failure to object to those portions of the prosecutors' closing and rebuttal arguments he complains of in this appeal.

¶ 211 Even if we were to consider the issue, the defendant cannot establish the prejudice-prong of the *Strickland* test. Based on the evidence presented at trial, we cannot say that there was a reasonable probability that the defendant would not have been convicted of the murder of the victim but for defense counsel's failure to object to those arguments by the prosecutors raised on appeal. *People v. McKinney***,** 2011 IL App (1st) 100317, ¶ 38.

¶ 212 The defendant failed to establish either plain error or ineffective assistance of counsel. Therefore, his claim of error as to the prosecutor's closing argument is procedurally defaulted.

¶ 213 X. Cumulative Error

¶ 214 The defendant contends that each of the errors he raised on appeal entitles him to a new trial. In any event, he is entitled to a new trial based on their cumulative effect. Our supreme court has recognized that individual errors, not reversible individually, may have the cumulative effect of denying a defendant a fair trial. *People v. Jackson*, 205 Ill. 2d 247, 283 (2001)

¶ 215 The defendant's reliance on *People v. Johnson*, 215 Ill. App. 3d 713 (1991), is misplaced. In *Johnson*, the reviewing court found multiple trial court errors each of which required reversal and a new trial for the defendant. The reviewing court's reference to "cumulative error" was in response to the State's argument that any error was harmless, either individually or in the aggregate. The court acknowledged that considered together, errors could require reversal even if as individual errors they did not. *Johnson*, 215 Ill. App. 3d at 734.

¶ 216 In the present case, none of the errors raised by the defendant either individually or cumulatively denied him a fair trial.

¶ 217 CONCLUSION

¶ 218 The defendant's conviction is affirmed.

¶ 219 Affirmed.