NO. 4-10-0517 Filed 6/13/11

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,	) Appeal from
Plaintiff-Appellee,	) Circuit Court of
v.	) Cass County
SHIRLEY SKINNER,	) No. 09CF129
Defendant-Appellant.	)
	) Honorable
	) Mark A. Schuering,
	) Judge Presiding.

PRESIDING JUSTICE KNECHT delivered the judgment of the court.
Justices Turner and Steigmann concurred in the judgment.

ORDER

Held: Defendant's motion to sever charges of solicitation of murder and first degree murder was properly denied. Defendant's convictions for solicitation of murder are reversed because the State's evidence failed to establish guilt beyond a reasonable doubt. Defendant's convictions for first degree murder, however, are affirmed. The evidence supports the finding of guilt beyond a reasonable doubt, and defendant failed to prove her allegations of prosecutorial misconduct and ineffective assistance of counsel.

In May 2010, a jury convicted defendant, Shirley Skinner, of solicitation of murder (720 ILCS 5/8-1.1(a) (West 2008)) and first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2008)). In June 2010, the trial court sentenced defendant to concurrent 15-year prison terms in the solicitation convictions and 55-year prison term for the first degree murder conviction. Defendant argues (1) the trial court erroneously denied her motion to sever charges; (2) she was denied a fair trial due to prosecutorial misconduct; (3) she was denied the effective assistance of counsel; and (4) the evidence is insufficient to sustain her convictions. We affirm in part, and reverse in part, and remand with directions.

I. BACKGROUND

On November 25, 2008, Steven Watkins died of a single gunshot wound to the back of his head in defendant's residence. In October 2009, defendant was charged with three counts of first degree murder. In count I, the State alleged defendant, without lawful justification and with intent to kill Steven, shot him in the back of the head and caused his death. See 720 ILCS 5/9-1(a)(1) (West 2008). In count II, the State alleged, in part, defendant shot Steven knowing said act would cause Steven's death. See 720 ILCS 5/9-1(a)(1) (West 2008). In count III, the State alleged, in part, defendant shot Steven in the back of the head knowing the act created a strong probability of his death. See 720 ILCS 5/9-1(a)(2) (West 2008).

In January 2010, two counts of solicitation of murder were added. One, count IV, alleged defendant asked Donald Russell to kill Steven (720 ILCS 5/8-1.1(a) (West 2008)). The second, count V, alleged defendant asked Leland Knott to kill Steven (720 ILCS 5/8-1.1(a) (West 2008)).

In May 2010, a jury trial was held on all counts. The State presented the only witnesses. They included, among others, Steven's mother, various medical-assistance personnel and police officers, attorneys involved in Steven's divorce case, and Russell and Knott.

Penny Watkins, Steven's mother, testified her son had two daughters, ages 10 and almost 3. Steven was married, but he filed for divorce from Jennifer Watkins in probably May 2008. Penny believed Steven and Jennifer had married in August 2006.

Penny testified when Steven filed for divorce, he was living in a mobile home with his older daughter in Chandlerville. Jennifer, at that time, resided with Steven's younger daughter, S.W., and her family at 11 Horseshoe Drive, Ashland, Illinois. Jennifer is S.W.'s

mother.

Penny testified when Steven and Jennifer first separated, Jennifer brought S.W. to Steven's house 2 or 3 times each week for a visit that lasted about 90 minutes to 2 hours. Jennifer did not let Steven or S.W.'s older half-sister play with S.W. during these visits. Instead, they watched S.W. play with Jennifer.

Wesley Charles Knapp II testified he volunteered as a first responder for a paramedics provider. On November 25, 2008, after 6:30 p.m., Knapp was dispatched to 11 Horseshoe Drive, Ashland. Rick Hand, an emergency medical technician (EMT), responded to the dispatch with Knapp.

Knapp testified when he arrived at the residence, several people waved them into the house. Knapp entered the house and saw defendant in the kitchen area, which was in front of them. In an area to defendant's right, Knapp observed Kenneth Skinner, Jennifer, and a baby. Defendant was "very frantic." She "was walking around very upset." Defendant said, "I shot him. Is he dead?" Knapp did not know what defendant was talking about, because he had not yet seen a body.

Knapp testified defendant made the same comment several times, and "she made kind of a motion or a gesture towards where the body was." Steven's body was on the floor approximately 20 feet from the entry. Defendant also said several times, "He shouldn't have come in here, you know." When Knapp saw the body, he checked to see if anything could be done medically. The body was facedown, and a large pool of blood formed around the head. Knapp believed no medical assistance could be provided.

Knapp walked back toward the kitchen. He noticed a handgun sitting on what

appeared to be moving boxes underneath a front window. It was approximately halfway between Steven's body and defendant. Neither Knapp nor Hand touched the handgun. Knapp "checked with [defendant] just to see once, as upset as she was, whether she had any medical conditions that we needed to treat." Knapp sat her down and tried to calm her. They also gave her oxygen and held her hand. After several minutes, defendant calmed down.

Knapp told Hand to call the police. In less than two minutes, James Birdsell, the chief of police for Ashland, arrived. Other officers and medical personnel arrived later.

Knapp testified while there, defendant's daughter Debra Webster arrived. Debra, a nurse, yelled at Knapp and Hand, telling them defendant had medical problems and needed to get to the hospital. Knapp explained they had to wait for the paramedics. Knapp estimated the paramedics arrived in under 10 minutes. Hand and Knapp helped place defendant into the paramedic unit for transportation. At this point, defendant was crying again and a little agitated.

On cross-examination, Knapp agreed he received the dispatch around 5:30 p.m. Knapp testified he was concerned about defendant's welfare. He agreed defendant was frantic, upset, and "walking around in a very agitated state." Defendant reported she had no medical issues, but Knapp later learned from Debra that was not correct. Knapp did not remember what condition Debra told her defendant had.

Knapp testified when the paramedics arrived, they immediately transported defendant to the hospital. Knapp testified when he treated defendant, he noticed an injury to her hand. Knapp described the injury as two parallel scratches between the thumb and forefinger. He noticed blood on the surface, but "[t]here was not blood running down her hand." Knapp testified no one mentioned defendant fell into a wall or was pushed into a wall. Knapp did

remember "something on the wall kind of by the stove," but he could not remember if it was broken or damaged.

Rick Hand testified he was a volunteer fireman and a paid EMT. When he received the dispatch to 11 Horseshoe Drive, he and Knapp took the ambulance to the residence. At the residence, Hand initially saw three or four people in one area of the house. Hand and Knapp, thinking their patient was with that group began to enter, and more than one of these individuals directed them another way.

Hand and Knapp found Steven's body on the floor. While they approached the body, defendant said, "I shot him." She also said something like, "He shouldn't have come back here." Hand did not question defendant about these statements. At that time, they were more concerned about Steven's condition. They determined there was nothing that could be done for the victim. There was a large wound in the back of the head and a large loss of blood. Hand and Knapp started toward the door. Hand noticed a gun on moving boxes. The two talked about the gun. They did not see a gun near the body.

Hand testified they did treat defendant while there. Hand and Knapp then decided they should not be at the residence "in case there was some kind of an additional shooting." When Chief Birdsell arrived, Hand reentered the house. At that point, Hand and Knapp attempted to calm defendant. Defendant "was becoming very upset at that point." Once they had defendant sit, they tried to determine whether she had any physical injuries. Hand noticed "two small parallel cuts on the back of one of" defendant's hands. The scratches had dried blood. Hand did not remember seeing any bruising.

Hand testified defendant told them she was okay. Debra arrived and insisted

defendant be taken in for medical evaluation. Around this time, Kenneth Skinner, who was on a cell phone, approached, and extended the telephone to defendant. Defendant "was excited."

In assisting defendant, Hand and Knapp asked if she had been hurt. Gesturing toward the corner, defendant said, "I fell into this." There was "some kind of decorative item or something that was broken off." Hand and Knapp were able to calm defendant.

On cross-examination, Hand testified when he was dispatched to 11 Horseshoe Drive, the only information provided by the dispatcher was the patient's name, "Watkins." Hand did not receive a second call. Hand testified it was a good estimate that he arrived after 5:48 p.m.

When Hand attempted to obtain defendant's medical history, defendant stated she was fine. After Debra arrived, however, Debra informed Hand defendant suffered "something along [the] lines" of heart problems. Hand also asked defendant if she had any injuries. Defendant said she "hit her head or something." Defendant gestured in the direction of the sconce. Hand testified he did not remember treating the hand or cleaning the wound.

Robert Daniel, a paramedic, testified on November 25, 2008, he received a call dispatching him to 11 Horseshoe Drive just before 6 p.m. The call from 9-1-1 indicated there was a woman with shortness of breath and chest pains after a domestic disturbance in her home. Daniel contacted his partner, Patricia Blair, to meet him to pick up a rig. After arriving at the residence, Daniel noticed a handgun on a packing crate. This handgun "could have been 15 feet" from Steven's body.

Daniel testified when he arrived, defendant seemed "[a]gitated, almost hysterical." When he asked questions, defendant was coherent, but she was "not always oriented to what we were trying to find out." He and his partner provided basic support to defendant. During this

time, family members were agitated and insisted Daniel and his partner were not moving fast enough. The paramedics loaded her in the rig and transported her. During the ride to the hospital, defendant's daughter sat in front of the ambulance with Daniel, while Blair was in the back with defendant. During the trip, defendant's daughter "[a] number of different times *** told her mother" not to say anything.

On cross-examination, Daniel testified he drove 80 miles an hour to the hospital with his lights and siren going. He was concerned about defendant's health and heart condition.

Patricia Blair, a paramedic, testified she rode with Daniel to 11 Horseshoe Drive on November 25, 2008. The first thing Blair saw upon her arrival at the residence was defendant sitting in a chair inside the front door. Blair took defendant's vitals and attempted to speak with defendant, but defendant was on the phone. At some point, defendant handed the phone to another and said, not to anyone in particular, "I shouldn't have done this." While at the residence, there was a lot of confusion or noise. A younger man made several remarks about "why we couldn't get out of there with the patient." Blair and Daniel loaded defendant on the ambulance.

Blair testified she was at 11 Horseshoe Drive approximately 20 minutes. Her assessment of defendant did not change in that time. Defendant's "vitals were in normal ranges, her pulse was elevated a little bit, and she was agitated and crying."

Blair testified during the ride to the hospital, defendant's daughter rode in front with Daniel, who was driving. Several times during the trip, defendant's daughter "leaned around the seat towards the back and said to her mother, 'Mother, don't say anything.'"

On cross-examination, Blair denied defendant was incoherent. Blair stated, while in the residence, defendant "was extremely agitated," but Blair could not "say she did not know

what was going on."

Blair testified she treated defendant's right hand. The injury "was probably midway between her index finger and her thumb." The injury appeared "like a bluish red, gray mark, maybe an inch in diameter." In treating this injury, she covered it with a piece of gauze and a piece of tape because she "wasn't sure if it was opened." Blair testified "[i]t looked like it had been pinched." Defendant told Blair the injury occurred that evening.

On redirect examination, Blair testified she could not tell whether it ever bled heavily or profusely. It was not bleeding freely.

John William Ralston, a forensic pathologist, testified he conducted the autopsy of Steven's body at Memorial Medical Center in Springfield. Dr. Ralston testified he found "no evidence of close range fire on [Steven's] skin." Dr. Ralston testified the shot could have occurred within several inches of the victim to several feet. Dr. Ralston, upon examining Steven's hands, found no evidence of defensive wounds. He opined the cause of Steven's death was a gunshot wound to his head.

Dr. Ralston testified the weapon was brought to the autopsy. Dr. Ralston observed "a bit of what appeared to be blood and a small amount of tissue on the slide of the weapon." He believed he mentioned this observation to the crime-scene investigator who was present. Dr. Ralston testified the width of the slide on the gun was "approximately three-quarters of an inch."

On cross-examination, Dr. Ralston testified he saw no blood or skin in the photograph of the gun. Dr. Ralston believed another photograph indicated a possible presence of blood, but acknowledged it could have been due to a "shadow." Dr. Ralston also agreed if no

DNA was found there, it was possible there was no skin or blood present.

Nolan Lipsky, an attorney, testified he represented Jennifer in her divorce case. Steven was the petitioner. In the divorce proceedings, Jennifer testified she did not want Steven to have visitation with their daughter. An order dated September 2008 gave Steven temporary unsupervised visitation every Tuesday and Thursday from 5:30 to 8 p.m., and every other weekend on Saturday and Sunday from 1 to 7 p.m. A hearing had been scheduled for November 26, 2008.

On cross-examination, Lipsky testified he spoke with defendant twice because she was a potential witness in the case. She did not tell Lipsky how to conduct the litigation and did not discuss strategies. There was one missed visitation due to Lipsky's confusion as to when the order took effect.

Larry Cave, a police officer with the Ashland police department, testified around 5:30 on October 30, 2008, he was called to 11 Horseshoe Drive for a domestic dispute over visitation. Officer Cave believed "Steven had called the county." When Officer Cave arrived at the residence, Steven was standing by his vehicle across the street. Steven informed Officer Cave he had visitation that evening and provided him documentation. After reading the documentation, Officer Cave approached the residence. Steven stayed at the street's edge.

Officer Cave testified when he arrived at the door, he was greeted by Kenneth Skinner, defendant's husband, and Bob Webster, Debra's husband and defendant's son-in-law. Officer Cave told them why he was present. The men interrupted him and began screaming at Steven. The men pointed their fingers at Steven and were angry with him, accusing him of not purchasing diapers for the child or doing anything for her. Steven stayed back and did nothing.

Officer Cave testified Steven had been denied visitation numerous times. Visitation did not occur that night. Kenneth and Bob told Officer Cave the child had been taken to the doctor because she was sick.

Michael Oyer, a sergeant and crime-scene investigator with the Illinois State Police, testified he received a call to 11 Horseshoe Drive around 7:15 p.m. on November 25, 2008. Sergeant Oyer testified he examined the front entry and found no signs of forced entry. Sergeant Oyer then testified regarding a wall sconce and planter. Sergeant Oyer, approximately 5 feet 10 inches tall, stated the wall sconce was approximately at his eye level. It remained mounted to the wall, but "the three light poles or posts that came off of it had been broken off and were hanging by the wire ***." Using a magnifying glass, Sergeant Oyer did not find hairs, fibers, tissue, or blood on the sconce. He also did not find any fingerprints on it. Regarding the planter, Sergeant Oyer observed, based on the impression in the carpeting, the planter was sitting several inches from where it had sat. Sergeant Oyer observed "no other signs of defects or damage to anything." Sergeant Oyer testified he observed "a Glock nine-millimeter" weapon on a moving box.

Sergeant Oyer testified he found the victim lying face down. He observed blood spatter around his head and torso. Sergeant Oyer prepared Steven's body to be transported to the morgue. He examined Steven's hands. Based on his preliminary examination, he found no wounds. No weapons were found on or near Steven's body.

Regarding gunshot residue, Sergeant Oyer testified the Illinois State Police used a gunshot-residue test only when someone said they were not near a weapon or did not fire a weapon. Sergeant Oyer did not use a gunshot-residue test in this case. He reasoned because

residue could be on anyone who had been in the room, the test would be unproductive.

On cross-examination, Sergeant Oyer testified when he arrived at the residence, only one family member remained, a man in his forties or fifties. Chief Birdsell was in charge of the investigation. He informed Sergeant Oyer there was a belief Steven made a forced entry into the residence. Chief Birdsell also told Sergeant Oyer defendant may have come into contact with the sconce.

Sergeant Oyer testified he did not see skin or blood on the weapon. During the autopsy, Dr. Ralson stated he saw a substance on the weapon. Sergeant Oyer testified he did not take a swab of that substance, because he submitted the weapon to the lab for deoxyribonucleic acid (DNA) and latent-print testing and "it [was] their [*sic*] job as a forensic scientist to examine that thoroughly and collect things."

Sergeant Oyer testified he noticed blood on the carpet and on a box. He did not collect the box or remove the carpet for evidence. He also did not use any tests to find blood not visible to the naked eye.

Kelly Biggs, a forensic scientist at the Illinois State Police forensic science laboratory, testified she tested swabbings of the Glock taken by another employee of the Illinois State Police for DNA. Biggs received swabbings from Kenneth, defendant, Robert, Debra, and Jennifer from which to compare any DNA found on the Glock. From the swabbing collected from the grip, the trigger, and a portion of the slide area, Biggs was able to obtain information for comparison purposes. She found a mixture of at least two people from this swabbing.

Biggs testified she found "a major male DNA profile present on the gun." By "major," Biggs testified it was in higher concentration to any other profiles found. The male

DNA profile did not match defendant, Kenneth, Robert, Debra, or Jennifer. Biggs also found "very low levels" of at least one other person on the weapon. Biggs excluded Kenneth, Robert, Debra, and defendant as a low-level contributor on the weapon. She was not able to draw any conclusions as to whether Jennifer's DNA was present on the gun. Steven was excluded as both the major male DNA profile and the low-level contributor.

Biggs testified in April 2010, she was instructed to swab portions of the inside rails of the weapon. She did not find enough DNA to use.

On cross-examination, Biggs testified she compared a standard from Chief Birdsell as well. He was excluded as the major male contributor, but no conclusions could be drawn as to whether he was the source of the low-level DNA.

Gwendolyn Thomas, an attorney, testified she represented Steven in the dissolution-of-marriage case against Jennifer. Steven contacted Thomas in January 2008 because he and Jennifer separated and Jennifer was not permitting him any contact with their daughter, S.W., who was under one year old at the time. Jennifer and S.W. resided with Jennifer's mother and grandmother.

In September 2008, a hearing was held on custody and visitation. According to Thomas, Steven was awarded unsupervised visitation with S.W. Between the period of September 17, 2008, when he was awarded visitation and November 2008, Steven complained to Thomas regarding visitation. A hearing to review the visitation schedule and mediation was set for November 26, 2008.

David Osmer testified he was the sheriff of Cass County the date Steven died. On November 25, 2008, Sheriff Osmer went to 11 Horseshoe Drive. When he arrived, Sheriff

Osmer spoke with Chief Birdsell. Chief Birdsell remained at the scene, while Sheriff Osmer went to the hospital in Springfield to speak with the Skinner family. During this conversation, Sheriff Osmer learned Kenneth was in the home that evening. Sheriff Osmer also asked Kenneth if he could look at defendant's clothing.

On cross-examination, Sheriff Osmer testified he did not see any evidence on defendant's clothing. Jennifer was also at the hospital.

On redirect examination, Sheriff Osmer testified while at the hospital, he tried talking to family members. They refused to talk to him.

Robert Carnduff, a private investigator, testified he was asked to meet with Jennifer and Debra on November 24, 2008. Debra and Jennifer asked him to be at the Olive Garden Restaurant in Springfield and to be seated in a location where he could overhear a conversation between Jennifer and Steve. Carnduff went to the restaurant and did overhear a conversation between the two of them. On November 25, 2008, he received a call from Debra asking him to go to Ashland around 4:45 p.m. and observe Steven's visitation pickup of S.W. Debra indicated S.W. "never want[ed] to go with the father" and wanted Carnduff to witness it. Carnduff testified he planned to be there. Around 3:30 p.m., however, Debra called Carnduff and told him his presence was no longer needed. Carnduff never met defendant.

Chief Birdsell testified it had been reported to him a husband had gone to 11 Horseshoe Drive to pick up his child for a visitation, an altercation occurred at that time, and the man left with his child. Chief Birdsell learned medical assistance was on the way, and he headed toward the residence. En route, Chief Birdsell received another call from the dispatcher, advising him the husband had not left the residence but had been shot. Chief Birdsell testified when he

arrived at 11 Horseshoe Drive, he met Hand, who was outside the residence. Inside, he saw defendant sitting in a chair and Knapp sitting beside her. Chief Birdsell then went to the body, which was approximately 30 feet from where he was standing. Chief Birdsell also observed on a cardboard moving box a Glock pistol, with a spent cartridge sticking out of the ejection port. He testified a common reference for a cartridge stuck in the ejection port is "stovepipe." The gun was approximately seven to nine feet away from defendant.

Defendant was crying and upset when Chief Birdsell arrived. He noticed, on her right hand, two skinned marks parallel to each other. They were about half an inch to three-quarters of an inch wide and approximately one inch long. The scratches "weren't bleeding profusely," but Chief Birdsell did notice some blood. Chief Birdsell testified when defendant was taken to the hospital, around 6:20 p.m., Jennifer, S.W., Debra, Kenneth, and two other men were at the house, in addition to the chief and four individuals from emergency medical services.

In his investigation, Chief Birdsell learned the Glock was purchased by Jennifer in October 2001. Chief Birdsell testified no one living at 11 Horseshoe Drive cooperated with him in identifying the person who shot Steven.

On cross-examination, Chief Birdsell agreed "it was very possible *** the sconce may have been broken when [defendant] fell against the wall and hit it with her hand or hit it with a part of her body."

Donald Russell testified he worked for the Skinners' company, Triple S Forest Products. One morning in the fall of 2008, Russell and Knott were working in defendant's office around 7 a.m. They were checking the ceiling tiles. Russell was on the ladder; Knott was steadying it. Russell overheard a conversation he believed was directed to Knott. Defendant said

she "was mad at somebody or something." Russell testified, "I think I heard her say something about wanting to, like, I thought she said she'd pay $10,000 to get rid of somebody or something." Defendant did not give a name or describe the individual. Russell responded by jokingly saying he could get "a Mexican to do it for 500 *** and pocket the 9,500." Russell testified he thought defendant said she was serious. Russell did not speak to defendant again about this conversation, because he did not want her to think he was interested.

Russell testified, in a previous proceeding in this case, he stated defendant might have used the word "clipped or capped." Russell believed these words meant killing someone.

On cross-examination, Russell agreed defendant was a "[p]retty nice lady" and a "[g]ood Christian person." Russell testified he did not want to be testifying in the case. He agreed he "let [his] big mouth run on this." Russell testified he spoke about defendant's statements to Eric Kerns, who ultimately wore a wiretap for the Illinois State Police. In October 2009, the State Police pulled up behind Russell as he pulled into his driveway. They played the wiretap for Russell and told him he must tell them how defendant solicited him or they were going to "get [him] for obstruction of justice or perjury." Russell was scared. Defense counsel asked the following: "[Defendant] never solicited you to commit a murder. Isn't that correct?" Russell responded, "No, sir."

On redirect examination, the following questioning occurred:

> "Q. So, although you answered the question that she didn't solicit you, she gave you a proposition, didn't she? Proposition. That was your word.
>
> A. I guess, yeah."

On re-cross-examination, Russell testified he did not take defendant's proposition seriously. Russell testified defendant did not contact him again on the subject. He also agreed he was not convicted of forcible felonies and was not a hit man. Russell stated, "I don't have a mean bone in my body."

Leland Knott, whose nickname is "Mike," testified he worked for Triple S Forest Products in the area of building maintenance. Knott testified he had a small hearing problem and, because of medical problems, a difficult time remembering things. He did not remember the alleged statements by defendant in his and Russell's presence. Knott did not say the conversation did not happen, he just did not remember it happening.

Ray Lisenbee, an employee of Triple S Forest Products, testified defendant was a secretary in the family business. Lisenbee testified he was friendly with defendant. Within a few days after the shooting, Lisenbee saw defendant in the office at work. Defendant was crying. Lisenbee asked defendant what was wrong. Defendant "said she did a bad thing."

On cross-examination, Lisenbee testified he knew in October 2009, between 10 and 11 months after Steven's death, defendant was arrested. Lisenbee heard many rumors about Steven's death during this time. Lisenbee did not report this conversation to the State Police until after defendant's arrest. Lisenbee further testified shortly after Steven's death, he observed bruises "all over [defendant's] arms."

Harry Loxley testified he was an excavation-demolition contractor that did some business with Triple S Forest Products. He knew defendant, who was in the office "quite a number of times" when Loxley visited. One day in October 2008, Loxley was in the Triple S Forest Products office, probably paying a trucking bill. Defendant was there. The two visited.

Defendant asked Loxley where she could buy a gun. Assuming defendant was going to purchase a gun for her grandsons for Christmas, Loxley responded he had not hunted for 15 years, but he assumed Rutledge, Missouri. Defendant did not indicate what type of gun she was interested in.

On cross-examination, Loxley testified Ed Skinner "got a trailer from [him] two years ago and *** [he] didn't get it back." When talking to the State Police, Loxley told the police the Skinner "family is a bunch of liars that don't pay their bills."

At the close of the State's case, defendant moved for a directed verdict. The trial court denied the motion. The jury found defendant guilty on all counts. The trial court sentenced defendant to concurrent prison terms: 15 years' imprisonment on each of the solicitation-of-murder counts and 30 years' imprisonment on the first-degree-murder counts plus 25 years' imprisonment because the murder was committed with a firearm.

This appeal followed.

II. ANALYSIS

A. The Motion To Sever Charges

Defendant first argues the trial court erred when it denied her motion to sever the charges of murder and solicitation for separate trials. Defendant maintains the charges were not part of the same comprehensive transaction because the two alleged offenses occurred in different locations and months apart, the elements of the offenses are different, and the evidence for each is different.

In contrast, the State contends the trial court did not err because the offenses were part of the same comprehensive transaction: both sets of charges involved the same victim, the same intent, and the same scheme to remove Steven from S.W.'s life. The State further argues

any error is harmless because, had the charges been severed, the evidence regarding both offenses would have been admissible as other-crimes evidence in separate trials.

Section 111-4 of the Code of Criminal Procedure of 1963 permits charging multiple offenses in the same indictment if those offenses "are based on the same act or on 2 or more acts which are part of the same comprehensive transaction." 725 ILCS 5/111-4(a) (West 2008). A defendant may move to sever charges for trial if it appears he or she "is prejudiced by a joinder of related prosecutions *** in a single charge or by joinder of separate charges." 725 ILCS 5/114-8(a) (West 2008). The decision whether to sever a matter is one within the trial court's discretion, a decision we will not disturb absent an abuse of that discretion. *People v. Mikel*, 73 Ill. App. 3d 21, 27, 391 N.E.2d 550, 555 (1979).

No precise criteria exist for deciding "whether separate offenses are part of the same comprehensive transaction." *People v. Trail*, 197 Ill. App. 3d 742, 746, 555 N.E.2d 68, 71 (1990). Factors courts have considered include "[a] common method of operation, proximity in time and location of offenses, a common type of victim, similarity of offenses, and the identity of evidence needed to demonstrate a link between the offenses." *Trail*, 197 Ill. App. 3d at 746, 555 N.E.2d at 71.

In this case, the State charged defendant with first degree murder and solicitation of murder. Both offenses occurred within the period Steven's court-ordered visitation was at issue (September 2008 through November 2008). Both apparently involved the same goals of preventing Steven's visiting S.W. and ending Steven's life. Moreover, regarding proof of intent in the murder charge, the State could have presented the evidence of the solicitation. Evidence of other crimes, though inadmissible for the purpose of showing a defendant's propensity to commit

a crime, is admissible if it is relevant for any other purpose, such as proof of intent or motive. *People v. Illgen*, 145 Ill. 2d 353, 364-65, 583 N.E.2d 515, 519 (1991). Such evidence would have been relevant and admissible as evidence of defendant's motive and intent in shooting Steven. See generally *Illgen*, 145 Ill. 2d at 365-66, 583 N.E.2d at 520 (Evidence is relevant "if it has any tendency to make the existence of any fact that is of consequence to the determination of an action more or less probable than it would be without the evidence.").

When other-crimes evidence is admissible, "'the potential prejudice to a defendant of having the jury *decide* two separate charges is greatly diminished because the jury is going to be receiving evidence about both charges anyway.'" (Emphasis in original.) *People v. Slater*, 393 Ill. App. 3d 977, 993, 924 N.E.2d 1039, 1052 (2009) (quoting *Trail*, 197 Ill. App. 3d at 746, 555 N.E.2d at 71). Defendant was not prejudiced by the joinder, or by the State's argument the jury could consider evidence of the solicitation as evidence of the murder. We find no abuse of discretion in the trial court's denial of the motion to sever.

Defendant's cases are distinguishable. In *People v. Pullum*, 57 Ill. 2d 15, 16-17, 309 N.E.2d 565, 566 (1974), the offenses involved were armed robbery, in which the defendant stole a Cadillac, and possession of marijuana, which was found on defendant 16 days later while he was in the stolen Cadillac. The *Pullum* court held the failure to grant a severance motion amounted to reversible error, after finding, in part, no common scheme connecting the two offenses. *Pullum*, 57 Ill. 2d at 18, 309 N.E.2d at 566. In *People v. Fleming*, 121 Ill. App. 2d 97, 102-03, 257 N.E.2d 271, 273 (1970), there were two charges of theft: one for a car, and another, eight months later, for theft of clothes and money. The only common theme was that defendant sold the stolen car in committing theft of clothes and money, which was given to him as part of

the purchase price. *Fleming*, 121 Ill. App. 2d at 99-100, 257 N.E.2d at 272. The First District held the incidental connection of the car to both events was insufficient to establish a common theme between the theft of the car and the theft of the money. *Fleming*, 121 Ill. App. 2d at 102-03, 257 N.E.2d at 273-74.

B. Sufficiency of the Evidence

Initially, we note defendant raises the arguments the evidence was insufficient to support her convictions for all charges of solicitation of murder and first degree murder as the final issues in her brief. Because we find the evidence on the solicitation charges insufficient to prove defendant guilty beyond a reasonable doubt, we first address those arguments here, allowing us to focus our review on the remaining allegations of error as related to only the first-degree-murder charges.

When the sufficiency of the evidence for a criminal conviction is in dispute, our task is to consider the evidence in the light most favorable to the prosecution and determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *People v. Ward*, 215 Ill. 2d 317, 322, 830 N.E.2d 556, 559 (2005). In performing this task, we examine the record, "while giving due consideration to the fact that the court and jury saw and heard the witnesses." *People v. Smith*, 185 Ill. 2d 532, 541, 708 N.E.2d 365, 369 (1999). When the evidence is so unreasonable, improbable, or unsatisfactory as to justify a reasonable doubt of defendant's guilt, we must reverse the conviction. *Smith*, 185 Ill. 2d at 542, 708 N.E.2d at 370.

1. *Solicitation-of-murder charges*

Defendant argues the State failed to prove her guilty beyond a reasonable doubt on

the solicitation-of-murder charges. Defendant contends there is no evidence establishing her actual intent, arguing Knott did not remember the alleged conversation and Russell believed no serious solicitation occurred.

The State maintains the evidence establishes both charges as Knott and Russell were both in the room when she stated she wanted to have someone "capped." The State focuses on Russell's testimony indicating defendant was serious and he did not mention it again because he did not want defendant to think he was interested in the proposition. The State further emphasizes the timing of the conversation--during the time Steven's visitation with S.W. was in dispute and the fact defendant admitted shooting Steven a short time later.

Under section 8-1.1(a) of the Criminal Code of 1961 (720 ILCS 5/8-1.1(a) (West 2008)), one "commits solicitation of murder when, with the intent that the offense of first degree murder be committed, he commands, encourages or requests another to commit that offense."

We find the evidence does not support a finding defendant committed solicitation to murder Steven beyond a reasonable doubt. The testimony regarding defendant's statements does not establish she, when making those statements, intended to have defendant killed beyond a reasonable doubt.

According to the record, there is only one testifying witness to the alleged solicitation: Russell. Knott could not recall whether such a conversation occurred. Russell's testimony is equivocal and vague. It is unconvincing and does not support a beyond-a-reasonable-doubt finding. Regarding defendant's statement, Russell could not even state whether defendant was angry about a person or a thing, much less a particular individual: "I took it as she was mad at somebody or something, and I think I heard her say something about wanting to, like,

I thought she said she'd pay $10,000 to get rid of somebody or something." When asked about defendant's particular words, Russell testified "I *thought* it was, get rid of them, or something to that effect." (Emphasis added.) He agreed he *thought* she used the word "clipped or capped." After Russell testified he jokingly referred to "getting Mexican to do it for 500 and [pocketing] the 9,500," he could only say, "I *thought* she said she was serious." (Emphasis added.)

Further undermining any substantial proof of intent, the testimony does not show defendant asked or encouraged Knott or Russell to kill anyone. Russell testified he simply *thought* defendant said "she'd pay $10,000 to get rid of somebody or something." Russell testified defendant had no reason to believe Russell, who testified he committed "no forcible felonies," would be willing to commit such an act. Russell testified he never believed defendant was serious or she solicited him to murder anyone. He further testified defendant, at no time, brought up the subject again.

The State, however, emphasizes Russell's testimony he did not mention the proposition again because he did not want defendant to think he was interested. This is arguably proof Russell believed defendant was serious and she intended a murder to occur. Such testimony is ambiguous, particularly in light of Russell's statements he never took defendant seriously on this issue.

The State further emphasizes the fact Steven died in defendant's living room "[s]everal weeks later" and the existence of the dispute over visitation as proof defendant intended Knott or Russell to kill Steven. While this is evidence toward intent, making it more likely Steven was the individual defendant was referring to when making her statements in Knott's and Russell's presence, it does not establish she had the intent for the first degree murder

of Steven or anyone in particular *beyond a reasonable doubt*.

We find the evidence insufficient to prove defendant guilty beyond a reasonable doubt on the solicitation-of-murder charges. Accordingly, we reverse the convictions on those two counts.

2. *First-degree-murder charges*

Defendant contends the evidence presented at trial is insufficient to sustain her convictions for first degree murder. She maintains the only evidence to point to her over other individuals in the house were her admissions, which she maintains were "rendered unreliable by the great amount of stress and confusion [she] was experiencing" and there is no evidence to establish she had the requisite intent for first degree murder. Defendant emphasizes the absence of physical evidence, such as gunshot residue, DNA, fingerprints, and splatter evidence.

Defendant was charged with three counts of first degree murder under section 9-1(a)(1) and 9-1(a)(2) of the Criminal Code of 1961 (720 ILCS 5/9-1(a)(1), (a)(2) (West 2008)). Under these sections, one "who kills an individual without lawful justification commits first degree murder if, in performing the acts which cause the death": he or she either "intends to kill or do great bodily harm to that individual or another" (720 ILCS 5/9-1(a)(1) (West 2008)) or "knows that such acts create a strong probability of death or great bodily harm to that individual" (720 ILCS 5/9-1(a)(2) (West 2008)). In count I, the State alleged defendant intended to kill Steven. In count II, the State alleged defendant intended to do great bodily harm to Steven. In count III, the State alleged defendant knew the act created a strong probability of death or great bodily harm to defendant.

When viewing the evidence in the light most favorable to the State, we find a

"rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Ward*, 215 Ill. 2d at 322, 830 N.E.2d at 559. When the medical personnel arrived on the scene, they found defendant frantic and "walking around in a very agitated state." Repeatedly and to two individuals at the scene, defendant made statements such as "I shot him" and asked "Is he dead?" Defendant also stated more than once Steven "shouldn't have come in here." En route to the hospital, defendant stated in Blair's presence, "I shouldn't have done this." Steven's body laid approximately 20 feet from defendant, and the handgun was between the two. Testimony shows Steven was shot in the back of the head from a distance that could have ranged from a few inches to a few feet. Lisenbee testified within a few days of the shooting, a crying defendant told him "she did a bad thing."

In addition to defendant's statements at the scene, testimony was entered from which it was reasonably inferred defendant was upset at Steven's visitation with S.W. Defendant was a potential witness in the divorce proceedings. Near the time court-ordered visitation began, defendant made the comments about having someone "capped." While we have concluded the evidence was not sufficient to prove solicitation beyond a reasonable doubt, we also conclude such evidence was admissible to show motive and intent. The record reveals instances of the family, from the great-grandmother defendant to the mother Jennifer, who resided together, acting to prevent Steven's visitation from occurring. In addition, the fact another hearing on visitation was to occur the day after Steven's death supports a conclusion the State satisfied the element of intent.

Contrary to her argument, defendant's agitated state seems to support her admission, not disprove it. From the testimony describing defendant's state of mind when

medical personnel arrived, the fact she was frantic and agitated reasonably supports her statements she recently shot someone and that someone may be dead. In addition, one paramedic denied defendant was incoherent. Another paramedic stated defendant was coherent, though "not always oriented to what we were trying to find out."

Moreover, the injury to defendant's hand, which one paramedic described as having appeared to have been pinched, had two parallel scratches with dried blood. Testimony established the slide on the Glock measured about three-quarters of an inch wide. Testimony further established the Glock slide remained open, as the spent shell remained in the ejection port or "stovepiped." The State argued in closing such action caused the pinching to defendant's hand, otherwise known as "Glock bite." A jury could have reasonably inferred the firing of the Glock caused defendant's hand injury.

Defendant's case, *In re Gregory G.*, 396 Ill. App. 3d 923, 929, 920 N.E.2d 1096, 1101 (2009), is factually distinguishable. In *Gregory G.*, the Second District reversed a finding of an adjudication of delinquency based on a charge of battery after concluding "it was unreasonable to infer that [respondent] hit [the victim] solely from the fact that he possessed a broken beer bottle." *Gregory G.*, 396 Ill. App. 3d at 929, 920 N.E.2d at 1101. The court focused on the fact that others possessed bottles during a melee, approximately 99 people were in the same vicinity, and there was a 2-minute lapse between the battery and the time the victim turned around and saw respondent, 10 feet away, holding a broken beer bottle. *Gregory G.*, 396 Ill. App. 3d at 929, 920 N.E.2d at 1101. At a minimum, the *Gregory G.* respondent did not admit striking the victim, nor was there evidence of a prior dispute between the two.

C. Prosecutorial-Misconduct Allegations

Defendant further argues her rights to due process were violated through a pattern of prosecutorial misconduct that denied her a "fair, orderly, and impartial trial." She argues the prosecution violated its duty to ensure the proceedings comported with due process in at least four ways: (1) "by improperly relying on an uncharged conspiracy to establish premeditation for the murder charge"; (2) by using "willfully emotive and misleading statements in closing arguments"; (3) by using leading questions through the direct testimony of the witnesses; and (4) by using a witness "frightened by the police and prosecution's behavior." Defendant appears to acknowledge these arguments are forfeited by the failure to object at trial or raise the arguments in a posttrial motion. She asserts the forfeiture rule and argues we may review the record for plain error.

Although defendant argues we may find "plain error," defendant does not explain *why* any alleged error arises to "plain error." Under the plain-error doctrine, a court may review an unpreserved or forfeited error when there is a clear and obvious error that occurs in one of two situations: (1) "the evidence is closely balanced," or (2) the "error is so serious *** it affected the fairness of the defendant's trial and challenged the integrity of the judicial process." *People v. Bannister*, 232 Ill. 2d 52, 65, 902 N.E.2d 571, 580 (2008). Defendant argues neither. Defendant only mentions the doctrine in passing (as "plain error") or in a parenthetical summarizing the holding of a case. She makes no effort to argue the evidence at trial was closely balanced or the alleged errors were so fundamental they denied her a fair and impartial trial and challenged the integrity of the judicial process. Defendant has forfeited these arguments. *People v. Moss*, 205 Ill. 2d 139, 168, 792 N.E.2d 1217, 1234 (2001). In addition, by not making such arguments, defendant cannot meet her burden of establishing plain error, and the procedural default must

stand. See *Bannister*, 232 Ill. 2d at 65, 902 N.E.2d at 580-81 (quoting *People v. Keene*, 169 Ill. 2d 1, 17, 660 N.E.2d 901, 910 (1995)).

Nevertheless, as we explain below, defendant was not denied a fair and impartial trial as a result of alleged prosecutorial misconduct. See *Moss*, 205 Ill. 2d at 168-69, 792 N.E.2d at 1234.

1. *The Uuse of an Uncharged Conspiracy To Prove Intent*

Here, defendant contends the State improperly used an uncharged conspiracy in violation of her due-process rights to introduce evidence of other family members' behavior, to support a finding of guilt on the first-degree-murder charges, and to argue someone must have killed Steven.

Defendant, however, cites no case law or authority establishing actions that may constitute an uncharged offense are not relevant or admissible in proving elements of a charged offense. In fact, our case law establishes otherwise. See *People v. Johnson*, 368 Ill. App. 3d 1146, 1159, 859 N.E.2d 290, 302 (2006) ("Whether defendant was ever arrested or charged for his conduct that constitutes other-crimes evidence is totally irrelevant to a determination of whether that evidence is admissible.").

At best, defendant cites authority that requires the State to inform a defendant of the charges against her. See, *e.g.*, U.S. Const., amend. VI; 725 ILCS 5/111-3 (West 2008); *People v. Drake*, 63 Ill. App. 3d 633, 636, 380 N.E.2d 522, 524 (1978). Defendant has established no violation of this requirement. Defendant was charged with first degree murder and solicitation of murder in an amended indictment. She was convicted of those counts. She was not charged with nor convicted of conspiracy to commit murder.

In addition, defendant cannot claim she was unaware of the State's theory regarding motive in the case: the family as a whole was angry about Steven's potential visits with S.W. and sought to deny Steven his visitation rights. At the April 2010 hearing, the State clearly articulated Steven's visitation with S.W. "raised the ire of not only the defendant but the entire clan that lives in that house." Moreover, the witnesses at trial included the attorneys in the divorce proceedings. Given no argument defense counsel was surprised by these witnesses, it is clear defense counsel knew the visitation issue, divorce, and the clan's "ire" were part of the State's case.

Defendant argues the prosecution almost exclusively and thus improperly relied on the alleged conspiracy to establish defendant's intent. We find no error.

The State presented evidence related to both defendant's conduct and the surrounding circumstances of the offense. See *People v. Raines*, 354 Ill. App. 3d 209, 220, 820 N.E.2d 592, 601 (2004) ("'Mental states, such as the intent to kill ***, are not commonly established by direct evidence and may be inferred from the character of the defendant's conduct and the circumstances surrounding the commission of the offense.'") (quoting *People v. Adams*, 308 Ill. App. 3d 995, 1006, 721 N.E.2d 1182, 1190 (1999)). In this case, several generations of the Skinner family resided under the same roof as defendant, including Jennifer and S.W. Under that same roof, Steven was shot on a Tuesday, around 5 p.m., when his court-ordered visitation was supposed to begin and one day before another court hearing on the issue of visitation was scheduled. Defendant admitted the shooting and was found near the body and weapon.

In addition, the record contains evidence, the statements to Knott and Russell made near the time of the first visitation order, from which it could be inferred defendant was

upset with defendant. Evidence of other family members' conduct on this regard, given they all resided together and acted in ways that were anti-visitation, were consistent with defendant's conduct and helped establish defendant's intent. See *Illgen*, 145 Ill. 2d at 364-65, 583 N.E.2d at 519 (holding other-crimes evidence is admissible to establish motive and intent). Moreover, the act of shooting Steven in the back of the head from a distance of a few inches to a few feet makes the inference of an intent to kill or cause great bodily harm more likely. See *People v. Buford*, 235 Ill. App. 3d 393, 405, 601 N.E.2d 1099, 1108-09 (1992) ("The very act of firing a gun at a person supports the conclusion that the shooter did so with an intent to kill."); see also *People v. Smado*, 322 Ill. App. 3d 329, 339, 750 N.E.2d 233, 242 (2001) ("Intent to kill may be inferred where one voluntarily commits an act, the natural tendency of which is to destroy another's life.").

Defendant further maintains the use of the uncharged conspiracy allowed the introduction of "irrelevant and hearsay evidence" regarding the actions of other family members. In particular, defendant points to Carnduff's testimony Debra asked him to come the day Steven was shot, but later called to tell him he was not needed. Defendant argues the testimony shows she did not know about the call, but the State referred to this in closing regarding defendant's intent. We have already determined the use of facts that may constitute an uncharged conspiracy was not improper as, given the circumstances, it was relevant to establish motive and intent. Moreover, Carnduff's comments were not hearsay. *People v. Campbell*, 332 Ill. App. 3d 721, 733, 773 N.E.2d 776, 786 (2002) ("Hearsay is defined as testimony regarding an out-of-court statement offered for the truth of the matter asserted."). In addition, even if error, it did not rise to plain error to the extent it was "so serious *** it affected the fairness of the defendant's trial

and challenged the integrity of the judicial process." *Bannister*, 232 Ill. 2d at 65, 902 N.E.2d at 580. Defense counsel made clear to the jury Carnduff did not speak to defendant.

Defendant also cites the following prosecution's statements in closing argument and argues they improperly set her up to fail as the family matriarch, lessening the State's burden of proof:

> "[T]he family, including other members; Shirley, in the final act of desperation, and Ken and Debbie, they all participated, but we're choosing to--and we have chosen to file charges against the person who admitted that she shot him, not to law enforcement, but to people treating her, people at work, not under any duress to say something.
>
> * * *
>
> He was killed by someone in that house. One of them is the killer. And the rest of them know it. And it's her."

We find no error. In both of these statements, the prosecution specified the shooter was defendant. The prosecution highlighted defendant's admissions. The prosecution did not seek to lessen the burden of proof.

Defendant's reliance on *People v. Smith*, 141 Ill. 2d 40, 565 N.E.2d 900 (1990), is unconvincing. Defendant quotes *Smith* as stating "when the State undertakes to prove facts which the State asserts constitute a motive for the crime charged, it must be shown that the accused knew of those facts." *Smith*, 141 Ill. 2d at 56, 565 N.E.2d at 906. The motive in this case is the desire to keep Steven from visiting S.W. It is not simply the fact Carnduff was hired

that provides the motive. The motive is provided by a cumulation of such facts, including a collective dislike of Steven among the family members who resided in the same house, and the circumstances surrounding defendant and Steven's shooting.

2. *The Prosecution's Statements in Closing Argument*

Defendant next points to two statements made by the prosecution during closing argument and argues these statements violated her due-process rights. Defendant contends these remarks asked the jury to return a verdict "grounded in emotion" and were an attempt to mislead the jury. The first, defendant argues, stressed for the jury defendant did not sufficiently care about the alleged offense:

> "[W]hile you're here listening to the witnesses and you're also observing what's going on in the courtroom, did you at any one time after you realized that you may have--you did kill a human being, destroyed his life, destroyed the life of his daughters' father, daughters plural, did you see one misty eye in this room? Did you see one moist eye?"

The second, defendant argues, mischaracterized her alleged admissions as physical evidence:

> "Where is the physical evidence against [defendant] in this case? I told you then in the opening statement, there is no physical evidence but for, but for, and this is as physical as it gets; her own statements. Not once, not twice, but you heard people sit there and say several times; I shot him. I shot him. *** That's about as physical as it ever gets; an admission. An admission to the most

horrible crime that a human being can commit ***."

The prosecution is afforded wide latitude in closing argument and may comment on the evidence and argue reasonable inferences from such evidence. *People v. Ngo*, 388 Ill. App. 3d 1048, 1054, 904 N.E.2d 98, 104 (2008). We review closing arguments in their entirety, viewing challenged remarks in context. *Ngo*, 388 Ill. App. 3d at 1054, 904 N.E.2d at 104. Even if the prosecution's remarks are improper, we must not disturb the verdict unless we can determine the remarks caused defendant substantial prejudice, considering the language's content and context, its relationship to the evidence, and any effect on the right to a fair and impartial trial. *People v. Williams*, 192 Ill. 2d 548, 573, 736 N.E.2d 1001, 1015 (2000).

Turning to the challenged remarks, we find neither caused defendant substantial prejudice. The first, the misty-eye remark was immediately objected to by defense counsel. After an off-record side-bar discussion, the trial court stated, "Objection sustained. Move on with your argument, please."

Defendant has not established this argument is improper. Defendant cites no case law supporting the argument a reference to defendant's conduct during trial is off limits during argument. Whether such comment is permissible, it does not rise to the level of creating substantial prejudice to defendant. It was a remark promptly objected to and sustained. It was isolated. It did not deny defendant a fair trial.

Similarly, even though an admission is not technically "physical evidence," the prosecution's citation of the admissions as "physical evidence" did not create substantial prejudice to defendant. The prosecution's argument acknowledged the defense's position there is no physical evidence: no DNA and no fingerprints. Calling a confession "physical evidence" did

not lessen the State's burden of proof or inflame the jury. It simply highlighted the fact that, in light of the absence of such evidence, the State had defendant's admissions.

3. *The State's Use of Leading Questions*

Defendant next contends the State improperly used leading questions during the direct examination throughout the entire trial. Defendant estimates approximately three-quarters of such questions were leading and cites pages from the transcripts where defendant maintains such questions were used. Defendant contends such prosecutorial misconduct, viewed cumulatively, is reversible as plain error. We note, again, defendant did not explain why such error was plain error. Defendant also states instructions to ignore leading questions may be insufficient to remedy prejudice caused. In support, she relies on *People v. McCray*, 60 Ill. App. 3d 487, 377 N.E.2d 46 (1978).

"Leading questions are, by definition, suggestive." *People v. Miles*, 351 Ill. App. 3d 857, 866, 815 N.E.2d 37, 45 (2004). A leading question suggests the answer to the interrogated person; especially one that may be answered with a simple "yes" or "no." *Miles*, 351 Ill. App. 3d at 866, 815 N.E.2d at 45. "A leading question does not harm the defendant if the question asked did not involve material information." *People v. Schuldt*, 217 Ill. App. 3d 534, 542, 577 N.E.2d 870, 876 (1991).

Despite citing pages of transcript testimony, defendant has not emphasized *any* leading questions that involved material information. Defendant only highlighted one line of questioning in her argument supporting her prosecutorial-misconduct argument, questions to Officer Larry Cave:

"Q. Did he charge up towards the house or scream back?

A. At no time.

Q. He wanted you to take care of the situation?

A. Yes, he did."

We fail to see how defendant was prejudiced by this line of questioning. Not only has defendant cited this language as evidence of improper leading questions, but also defendant argues, without any citation to authority or further argument, such evidence was improper because defendant had not introduced evidence of self-defense. This latter argument is forfeited. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) ("Points not argued are waived ***."). Nevertheless, we note testimony was entered and used to argue a self-defense-based argument: for example, Steven entered the residence uninvited (including "he should not have come in here"), caused defendant to strike her hand or head on a wall sconce, and caused a domestic disturbance in which he took S.W.

In her reply brief, defendant adds questions from Knott's testimony. For example, she cites two questions that imply there was a conversation where defendant "want[ed] something done":

"Q. You remember any time in the fall, a year and a half ago in the fall of -08, do you remember any conversation in the office with you, Donald Russell, and [defendant] where she was talking about wanting something done?

A. No.

* * *

Q. So, are you saying that nothing happened, no conversa-

tion happened between you and [defendant] in October of '08, or you just don't remember it?

A. I don't remember. I'm not saying it didn't happen. I just don't remember it happening."

We could consider this argument forfeited as it was not raised in the opening brief and, therefore, denied the State the opportunity to respond. See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008) ("Points not argued are waived and shall not be raised in the reply brief ***."). We fail to see how these questions denied defendant a fair trial. Russell already testified the conversation occurred. Thus, the jury knew of the alleged conversation *before* the State referred to it here.

Defendant's reliance on *McCray* is misplaced. First, in *McCray*, the leading question was asked during cross-examination, which is permissible. See *McCray*, 60 Ill. App. 3d at 489, 377 N.E.2d at 47-48 (1978). Second, the line of questioning causing prejudice established the defendant had a limited education and questioned whether he had "any occupation other than robbing people." See *McCray*, 60 Ill. App. 3d at 489-90, 377 N.E.2d at 48. There is no similarity between the specified challenged questioning in this case and that in *McCray*.

4. *Russell's Testimony He Was Scared by the State's Conduct*

Defendant contends the State used improper tactics to secure evidence against her. Defendant emphasizes the State Police's contact with Russell, when they pulled into his driveway behind him.

Defendant acknowledges informing an individual of the consequences of not cooperating in an investigation, such as perjury or obstruction-of-justice charges, is not improper. Defendant then, however, argues the line was crossed when the police officers followed Russell

"onto the curtilage of his home."

Defendant, again, has cited no case law or authority to support her claim the State should not use a witness to testify in a case against another individual when that witness may have an argument the police violated his right to privacy. Defendant has cited no authority showing she has standing to complain about an alleged violation of Russell's right to privacy or showing how such alleged violation affected her trial. The only two cases cited by defendant involve searches and seizures against the accused individuals themselves and are, therefore, distinguishable. See *United States v. Dunn*, 480 U.S. 294, 297-98 (1987); *People v. Pitman*, 211 Ill. 2d 502, 504-05, 813 N.E.2d 93, 96-97 (2004).

Defendant has not established prosecutorial misconduct permeated her trial and thus denied her a fair and impartial trial or challenged the integrity of the judicial process. Reversal on this ground is not required.

D. Assistance of Counsel

Defendant next argues she was denied the effective assistance of counsel on four grounds: defense counsel (1) failed to object to the trial court's practice of hearing all objections off the record; (2) failed to object to irrelevant and hearsay evidence used to establish intent; (3) failed to submit a jury instruction for second degree murder; and (4) misunderstood how the law of solicitation related to first degree murder.

To establish an ineffective-assistance-of-counsel claim, defendant must show (1) her counsel's performance was inadequate "in that it fell below an objective standard of reasonableness," and (2) a reasonable probability exists the outcome of the proceeding would have been different absent counsel's deficient performance. *People v. Moore*, 189 Ill. 2d 521, 535, 727

N.E.2d 348, 355-56 (2000) (citing *Strickland v. Washington*, 466 U.S. 668, 687, 694 (1984)). Because defendant must prove both prongs of the *Strickland* test to prevail, we may resolve defendant's ineffective-assistance claims "solely on the ground that the defendant did not suffer prejudice without deciding whether counsel's performance was constitutionally deficient." *People v. Little*, 335 Ill. App. 3d 1046, 1052, 782 N.E.2d 957, 963 (2003).

1. *Failure To Object to the Trial Court's Practice of Hearing Objections off the Record*

In this case, the trial court had the practice of hearing all objections at sidebar out of the jury's presence. In one instance, the court warned counsel, who objected on relevance and scope grounds, to do so at the bench, "not in front of the jury."

Defendant begins her argument by citing law establishing the importance of having full reporting of judicial proceedings. See 705 ILCS 70/5 (West 2008) ("The court reporter shall make a full reporting *** of the evidence and such other proceedings in trials and judicial proceedings ***."). Defendant contends defense counsel's failure to object regarding this process denied the appellate court and counsel the opportunity to review the record on appeal. Defendant maintains defense counsel's failure to object fell below an objective standard of reasonableness and violated her constitutional rights.

It is a better practice to have a court reporter record the objections at trial though that may require effort and making a record outside the presence of the jury. While we agree with defendant on this point, she has not established defense counsel provided ineffective assistance. The applicable test has two prongs. Defendant ignores the second: a reasonable probability exists the outcome of the proceeding would have been different absent counsel's deficient performance. *Moore*, 189 Ill. 2d at 535, 727 N.E.2d at 355-56. Defendant has not

pointed to any specific objection she claims erroneous and unreviewable. Defendant has not provided a bystander's report or agreed statement of facts as a substitute for the missing transcript for any challenged objection. See Ill. S. Ct. R. 323(c) (eff. Dec. 13, 2005). Defendant has also not alleged an attempt to comply with Rule 323(c). Defendant cannot establish the second prong. This argument fails.

In her reply brief, for the first time, defendant points to an objection that occurred during the questioning of Chief Birdsell. Defense counsel objected after Chief Birdsell answered the following question: "Of the people that were living in that house, from that date until today, have you received any cooperation from any of them in learning who shot [Steven]?" Defendant contends the objection was erroneously overruled and prejudiced defendant because it infringed on the family members' invocation of the right not to answer questions.

Defendant forfeits this argument by not raising it in her initial brief or supporting her argument the question came "perilously close to violating the strictures of *Doyle v. Ohio*, 426 U.S. 610 (1976)." See Ill. S. Ct. R. 341(h)(7) (eff. July 1, 2008). In addition, defendant makes this argument based in part on her argument the prosecution improperly relied on an uncharged conspiracy. Its foundation thus fails. Last, defendant fails to show how a transcription of the discussion of the objection would have helped.

2. *Failure To Object to Evidence Used To Establish Intent*

Defendant next argues defense counsel was ineffective for failing to object to Carnduff's testimony related to the events of November 25, 2008. Defendant argues defense counsel should have objected to the admission of this testimony on relevance and hearsay grounds. Defendant contends the testimony involved a conversation with Debra, did not involve

herself, and undermines her conviction for the offense.

Defendant cites the following testimony:

"Q. *** Did you make plans to go there and do the observations as you were requested to do by Jennifer's mother?

A. Yes, sir, I did.

Q. Sometime later after that phone call before noon, did you get another phone call regarding going over there?

A. Not before noon. I got a phone call.

Q. I mean the first call was before noon from Debra?

A. Yes, it was.

Q. After that phone call, did you receive another phone call in the afternoon--

A. I did.

Q. Excuse me--regarding whether your presence would still be needed?

A. I did, and I was told my presence wouldn't be needed.

Q. Who did you receive that phone call--

A. From Debra."

In our analysis regarding alleged prosecutorial misconduct, we determined the testimony was relevant and not hearsay. Defense counsel is not ineffective for failing to bring a futile objection. See generally *People v. Ivy*, 313 Ill. App. 3d 1011, 1018, 730 N.E.2d 628, 636 (2000) ("An attorney is not required to make futile motions to avoid charges of ineffective

assistance of counsel."). Even if such evidence was improperly admitted, there is no reasonable probability the outcome of the proceeding would have been different absent counsel's deficient performance. This was one small piece of evidence in the State's theory to show motive or intent. Without it, ample evidence supports defendant's conviction. In addition, defense counsel made clear for the jury defendant had not spoken to Carnduff.

3. *Failure To Submit a Jury Instruction for Second Degree Murder*

Defendant next argues defense counsel was ineffective for failing to submit a jury instruction for second degree murder. Defendant contends the 9-1-1 tape, not submitted at trial, contains evidence supporting provocation or imperfect self-defense when Jennifer "indicated to the dispatcher in an excited utterance that Steven *** came through the door and knocked down [defendant]."

We find defendant cannot establish a reasonable probability the trial's outcome would have been different absent counsel's deficient performance, because no evidence supports giving the second-degree-murder instruction. A trial court should not give a lesser-included-offense instruction or, more accurately in this case, a lesser-mitigated-offense instruction, unless a jury could rationally find the defendant guilty of the lesser offense. *People v. Medina*, 221 Ill. 2d 394, 410, 851 N.E.2d 1220, 1229 (2006). A jury may find a defendant guilty of second degree murder if it finds the defendant believed circumstances existed that justified the use of deadly force and that belief was unreasonable. *People v. Jackson*, 372 Ill. App. 3d 605, 615, 874 N.E.2d 123, 131 (2007).

In this case, no evidence here would have permitted a rational jury to conclude defendant believed, albeit unreasonably, it necessary to use deadly force. While defendant points

to the 9-1-1 tape, the tape is not in evidence and cannot be the basis for a jury instruction.

4. *Misunderstanding the Law of Solicitation as It Relates to First Degree Murder*

Defendant further argues defense counsel was ineffective in that counsel did not understand defendant could be convicted of both solicitation and first degree murder. After the verdict came in, defense counsel stated for the record the following:

> "I'm not sure in my own mind at this time as to the status of the law with respect to the inchoative offenses of solicitation and the accomplished act of first degree murder. I'm thinking in my mind of burglary situations where the included offense, the court does not enter judgment. The court's entered its judgment, and we're agreeable to that at this time, but I don't want to be deemed to have waived in a post-trial motion ***."

Defendant also points to defense counsel's similar comments when urging a motion for a new trial--we note, however, upon reading the record of the posttrial motions cited by defendant we found no such comments.

Nevertheless, the case law establishes defense counsel was incorrect in these circumstances. See generally *People v. Woodard*, 367 Ill. App. 3d 304, 317, 854 N.E.2d 674, 688 (2006) ("Where a defendant asks one person to commit murder, and that person refuses but another person agrees and carries out the requested deed, the defendant may stand convicted of solicitation in the first instance and convicted of first degree murder in the second scenario."). Defendant has not shown how she was prejudiced by this misapprehension. Defendant argues had defense counsel understood the law he would have requested a second-degree-murder

instruction, but does not explain the basis for this argument. Defense counsel defended both sets of charges. Having failed to show there is a reasonable probability the outcome of the proceeding would have been different absent counsel's deficient performance (see *Moore*, 189 Ill. 2d at 535, 727 N.E.2d at 355-56), defendant has not shown she was denied the effective assistance of counsel.

Defendant's case, *People v. Chandler*, 129 Ill. 2d 233, 543 N.E.2d 1290 (1989), is distinguishable. In *Chandler*, our supreme court concluded "[d]efense counsel apparently mistakenly believed that the jury could find defendant not guilty of murder if they believed that he had not inflicted the fatal wounds to the victim," and such mistaken belief led to a finding of guilty based on felony murder and accountability. *Chandler*, 129 Ill. 2d 247, 543 N.E.2d at 1295-96. This mistake led to a conviction on a count defense counsel had not anticipated the jury would hear. In this case defense counsel knew the jury would consider both the solicitation and first-degree-murder charges and defended defendant on all charges.

III. CONCLUSION

For the reasons stated, we reverse defendant's convictions on the solicitation-of-murder charges, affirm her first-degree-murder conviction, and remand for issuance of an amended sentencing judgment so reflecting.

Affirmed in part, reversed in part, and remanded with directions.