

NOTICE
This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2011 IL App (4th) 100096-U

Filed 9/16/11

NO. 4-10-0096

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from
Plaintiff-Appellee,)	Circuit Court of
v.)	Sangamon County
BRANDON J. NELSON,)	No. 07CF1080
Defendant-Appellant.)	
)	Honorable
)	John W. Belz,
)	Judge Presiding.

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

ORDER

- ¶ 1 *Held:* Prosecutor's comments during closing argument did not constitute plain error; the trial court did not err when it denied defendant's motion to suppress in part; and the trial court did not abuse its discretion when it sentenced defendant to 40 years in prison.
- ¶ 2 On October 22, 2009, a jury convicted defendant, Brandon J. Nelson, of three counts of first degree murder (720 ILCS 5/9-1(a)(1), (a)(2) (West 2006)) for the death of Devyn Greff. On January 26, 2010, the trial court sentenced defendant to 40 years in prison.
- ¶ 3 Defendant appeals, arguing (1) he was denied effective assistance of counsel because counsel failed to request a second degree murder instruction; (2) he did not receive a fair trial because the State repeatedly disparaged defense counsel in rebuttal argument; (3) the trial court erred when it denied defendant's motion to suppress in part; and (4) the trial court abused its discretion when it sentenced defendant to 40 years in prison. We affirm.

¶ 4 On September 27, 2007, the State charged defendant by information with three counts of first degree murder. The charges specifically alleged defendant struck Greff about the head with a concrete block without lawful justification and with (1) the intent to kill Greff or (2) the knowledge said act would cause Greff's death or (3) the knowledge that such act created a strong probability of death or great bodily harm to Greff, thereby causing Greff's death.

¶ 5 In October 2009, the trial court held a jury trial on the charges. The following is the evidence relevant to the issues on appeal. Jeremy Younker testified that he was Greff's roommate. On the night Greff died, Younker had picked up Greff from a party because Greff was too drunk to drive. As they returned to their apartment, Greff began arguing with a "black male" in the street. Younker took Greff upstairs. At some point, Younker went back downstairs where he encountered the same black male Greff had yelled at as well as other black males.

¶ 6 Younker testified that one of the black males "tackled" him. The shortest black male of the group told the black male fighting Younker that he was fighting the wrong guy. At some point Greff came outside and confronted the black male that had fought with Younker. Younker testified that words were also exchanged between Greff and the man Greff initially argued with. Younker stated that "somebody punched [Greff] in the face and he went down." Younker believed Greff was "knocked out" because Greff was "laying on his back and his arms were stiff." Younker was unsure which man "knocked out" Greff.

¶ 7 After Greff was on the ground, the black make that tackled Younker picked up something "near the neighbor's front porch." Younker heard a "thud" near Greff. According to Younker, after the thud, two, maybe three, black males ran away but one man stayed behind.

¶ 8 Younker placed a 9-1-1 call, which was recorded and published to the jury.

¶ 9 A "souvenir bat" wrapped with black tape was found in Greff's waistband at the hospital and another "souvenir bat" was found at the scene.

¶ 10 Antowin "Shorty" Nelson, defendant's uncle, testified that two "white males," one short and one tall, approached him as he was riding his "BMX" bicycle down Seventh Street. Younker was identified as being taller than Greff. Nelson stated that at the time he was intoxicated and "high." Nelson testified that the short white male used a racial slur and asked him, "what are you doing on this block?" Nelson called defendant and told defendant that he was about to get "jumped." After the call, Nelson left to get his friend, Albert Turrell Wright.

¶ 11 Wright and Nelson rode back to the apartment where Nelson had been approached by the white men. The shorter male was gone but the taller man was outside. Nelson was talking to the tall white man. Defendant rode up on a bicycle and started "jumping" on the tall white man.

¶ 12 Nelson testified that at some point the shorter white man came downstairs and began approaching Nelson. Nelson was standing on the driveway in front of the house, close to the street, when the shorter man came downstairs. Nelson testified that once again the short white man used a racial slur. The man began saying, "you all need to get away from here before somebody gets hurt." While the short white man was yelling at Nelson, he also began reaching behind his back as if he had a weapon. Nelson never did see what the man was reaching for. Defendant began asking the man what he had behind his back. Nelson testified that while the short white man was distracted by defendant, Nelson punched him. Nelson said after the punch, the man fell straight back and hit the ground. Nelson told the others to leave and he rode away alone.

¶ 13 Nelson testified that officers came to his house after the incident and that he had hidden in a closet. Nelson acknowledged that he had initially lied to officers about his name and that he had a warrant for his arrest. Nelson agreed that during an interview with police, he told officers that defendant had a brick. At trial, Nelson testified that he did not see defendant with a brick on the night of the incident and that defendant never told Nelson something about dropping a brick. Nelson stated he lied to police about defendant dropping a brick because he wanted to end the interview and he simply told the officers what they wanted to hear.

¶ 14 Nelson testified he knew about the brick because a man named Robert Menz told him that a man's head had been "smashed" by a brick and that the police were looking for two "black males," one short and one tall.

¶ 15 Keith Williams, a detective with the Springfield Police Department, testified that he interviewed Nelson the morning after the fight. Nelson mentioned a brick was used before the detectives told him that Greff had been injured by a brick.

¶ 16 Wright testified that on the night of Greff's death, Nelson asked Wright to follow him to an apartment. Wright only knew defendant as "Shorty's nephew." Wright stated that defendant "jumped" the tall white male. Meanwhile, the shorter of the two white men came outside and began reaching for something behind his back. Wright believed the man had a knife. Wright testified that the shorter man did not use any racial slurs, but he did begin saying, "get out of here, or I'm gonna 'F' you up."

¶ 17 Nelson began approaching the short white male while the man was near the garage. Wright testified that Nelson punched the short white male. Wright stated that the man was "knocked out" onto the driveway. The man's head was lying on the ground to the side. He

was motionless except that his teeth were chattering. Nelson left after the punch.

¶ 18 Wright testified that after Nelson left, defendant came from "around the corner" and tossed a "cinder block" onto the short white male. Defendant was at the short white male's feet when he tossed the block into the air. Wright performed cardiopulmonary resuscitation (CPR) on the short white man.

¶ 19 Wright confirmed that when he gave statements to police he referred to defendant as "one of the dudes" because he did not know his name.

¶ 20 Dennis Arnold, of the Springfield Police Department, testified that defendant ran from the police when the police tried to bring him in for questioning. A transcript of the admissible portions of defendant's statement to police with the corresponding redactions was presented to the jury during trial. Defendant's interview with police was also published to the jury.

¶ 21 During defendant's interview, defendant initially denied any involvement. However, defendant eventually told the detectives that he was present during a fight between Nelson and two "white guys." Defendant said that Nelson "knocked out" a "short white dude" that had a knife. Defendant stated that the white man bounced when he first hit the ground. Defendant told the officers that the white man tried to get up after the punch. Defendant denied having any knowledge of what may have happened after Nelson punched the white man.

¶ 22 Dr. Jessica Bowman, a pathologist with training in forensic pathology, testified that Greff died from blunt force trauma to the head.

¶ 23 After both sides rested, defense counsel asked that the jury be instructed on both involuntary manslaughter and self-defense. The trial court allowed the instructions. On October

22, 2009, the jury found defendant guilty of first degree murder.

¶ 24 On January 21, 2010, defendant filed a motion for a new trial. On January 26, 2010, the trial court denied the motion for new trial and sentenced defendant to 40 years in prison. On January 28, 2010, the court denied defendant's motion to reconsider his sentence.

¶ 25 This appeal followed.

¶ 26 Defendant argues that his trial counsel was ineffective for failing to tender a jury instruction for second degree murder. In order to find defendant guilty of second degree murder, the jury would have to first find the State proved each proposition for first degree murder beyond a reasonable doubt, including "[t]hat the defendant was not justified in using the force which he used." Illinois Pattern Jury Instructions (IPI), Criminal, No. 7.06 (2006). The burden would then fall on defendant to prove "by a preponderance of the evidence that [the] mitigating factor [of unreasonable belief] is present" to reduce the offense to second degree murder. IPI, Criminal, No. 7.06 (2006).

¶ 27 To establish ineffective assistance of counsel, a defendant must demonstrate both that counsel's performance was deficient and that he was prejudiced by counsel's error. *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693, 104 S. Ct. 2052, 2064 (1984). Counsel's performance is presumed to be the product of sound trial strategy and not of incompetence (*Strickland*, 466 U.S. at 689, 80 L. Ed. 2d at 694-95, 104 S. Ct. at 2065), and no *Strickland* violation will be found unless counsel's professional errors are so serious that "counsel was not functioning as the 'counsel' guaranteed the defendant by the sixth amendment" (*Strickland*, 466 U.S. at 687, 80 L. Ed. 2d at 693, 104 S. Ct. at 2064). To satisfy the prejudice prong, a defendant must demonstrate that, but for defense counsel's deficient performance, the

result of the proceedings would have been different. *Strickland*, 466 U.S. at 694, 80 L. Ed .2d at 698, 104 S. Ct. at 2068. Both prongs must be satisfied before a defendant can prevail on an ineffective-assistance-of-counsel claim. *People v. Coleman*, 183 Ill. 2d 366, 397-98, 701 N.E.2d 1063, 1079 (1998).

¶ 28 This court has repeatedly held that an adjudication of a claim for ineffective assistance of counsel is better made in proceedings on a petition for postconviction relief, where a complete record can be made. *People v. Evans*, 369 Ill. App. 3d 366, 383, 859 N.E.2d 642, 655 (2006); *People v. Calvert*, 326 Ill. App. 3d 414, 421, 760 N.E.2d 1024, 1030 (2001); *People v. Holloman*, 304 Ill. App. 3d 177, 186, 709 N.E.2d 969, 975 (1999); *In re Carmody*, 274 Ill. App. 3d 46, 56, 653 N.E.2d 977, 984 (1995); *People v. Palacio*, 240 Ill. App. 3d 1078, 1087, 607 N.E.2d 1375, 1380 (1993); *People v. Flores*, 231 Ill. App. 3d 813, 827-28, 596 N.E.2d 1204, 1213-14 (1992); *People v. Kunze*, 193 Ill. App. 3d 708, 725-26, 550 N.E.2d 284, 296 (1990). Our rationale centered around the absence of a useful record in considering the issue. In the above-cited cases, as in this case, the record contained nothing to review with respect to the reason for defense counsel's actions.

¶ 29 We are unable to determine why counsel did not submit a jury instruction on second degree murder and whether that decision constituted a trial tactic or incompetence. Defendant acknowledges at sentencing, counsel stated that "the defense and the Defendant in particular" had elected not to submit a second degree murder instruction. Illinois courts have specifically held that "[t]he decision to offer an instruction on a lesser-included offense is one of trial strategy, which has no bearing on the competency of counsel." *People v. Balle*, 256 Ill. App. 3d 963, 971, 628 N.E.2d 509, 514 (1993); see also *People v. McIntosh*, 305 Ill. App. 3d 462, 471,

712 N.E.2d 893, 900 (1999); *People v. Nunez*, 319 Ill. App. 3d 652, 659, 745 N.E.2d 639, 646 (2001); *People v. Dominguez*, 331 Ill. App. 3d 1006, 1015, 773 N.E.2d 1167, 1174 (2002); *People v. Benford*, 349 Ill. App. 3d 721, 728, 812 N.E.2d 714, 720 (2004). Although second degree murder is not technically a lesser included offense of first degree murder, the same considerations apply. See *People v. DuPree*, 397 Ill. App. 3d 719, 734, 922 N.E.2d 503, 516 (2010). "Matters of trial strategy are generally immune from claims of ineffective assistance of counsel." *People v. Smith*, 195 Ill. 2d 179, 188, 745 N.E.2d 1194, 1200 (2000). Because the answers to the questions pertinent to defendant's claim are currently *dehors* the record, we decline to consider them. Instead, defendant may pursue his claim under the Post-Conviction Hearing Act (725 ILCS 5/122-1 through 122-8 (West 2006)).

¶ 30 Defendant next argues he did not receive a fair trial because the State repeatedly disparaged defense counsel in rebuttal argument. We disagree.

¶ 31 Initially, we note defense counsel did not object to the complained-of statements in the State's closing argument. Thus, we find this issue forfeited. See *People v. Hestand*, 362 Ill. App. 3d 272, 279, 838 N.E.2d 318, 324 (2005) (a defendant must object at trial and raise the issue in a posttrial motion to preserve the issue for review on appeal). Defendant, however, argues the alleged error amounted to plain error and asks us to review his claim under the plain-error doctrine.

¶ 32 In *People v. Herron*, 215 Ill. 2d 167, 186-87, 830 N.E.2d 467, 479-80 (2005), our supreme court discussed the plain-error doctrine, in part, as follows:

"[T]he plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when

either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence. In the first instance, the defendant must prove 'prejudicial error.' That is, the defendant must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. The State, of course, can respond by arguing that the evidence was not closely balanced, but rather strongly weighted against the defendant. In the second instance, the defendant must prove there was plain error and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process."

¶ 33 A prosecutor is afforded wide latitude in making his closing argument and may comment on the evidence as well as argue reasonable inferences from the facts. *People v. Simms*, 192 Ill. 2d 348, 396, 736 N.E.2d 1092, 1124 (2000). "[C]losing arguments must be viewed in their entirety, and the challenged remarks must be viewed in context." *People v. Wheeler*, 226 Ill. 2d 92, 122, 871 N.E.2d 728, 745 (2007). Further, "[e]ven if prosecutorial comment exceeds the bounds of proper argument, the verdict must not be disturbed unless it can be said that the remark caused substantial prejudice to the defendant [citation], taking into account 'the content and context of the language, its relationship to the evidence, and its effect on the defendant's right to a fair and impartial trial.'" *People v. Williams*, 192 Ill. 2d 548, 573, 736 N.E.2d 1001, 1015 (2000), quoting *People v. Kliner*, 185 Ill. 2d 81, 152, 705 N.E.2d 850, 886

(1998). Even prejudicial statements by the prosecutor may be cured by the trial court's proper instructions of law. *Simms*, 192 Ill. 2d at 396, 736 N.E.2d at 1124-25. "The accused is denied a fair and impartial trial where the prejudice reveals a total breakdown in the integrity of the judicial process." *People v. Evans*, 209 Ill. 2d 194, 224, 808 N.E.2d 939, 956 (2004).

¶ 34 In this case, defendant sets forth two allegations of error in the State's closing arguments. First, he contends the prosecutor told the jury that it was "insulting" for defense counsel to argue both that defendant was not guilty and that there were mitigating factors in this case making defendant less culpable for his actions. Unlike defendant, we believe these remarks were not targeted at defense counsel; the prosecutor was referring to defendant. Further, we find no error in the remarks which were fair comments on the evidence. See *People v. Enis*, 163 Ill. 2d 367, 407, 645 N.E.2d 856, 874 (1994) (a prosecutor may comment on the facts and legitimate inferences that may be drawn therefrom). The prosecutor reviewed the various theories advanced by defendant and demonstrated how they were flawed.

¶ 35 Second, defendant argues the prosecutor erroneously told jurors that defense counsel was attempting to misdirect them in the same way defendant had misdirected Greff. It is improper for the State to suggest in closing argument that defense counsel fabricated a defense theory, used trickery or deception, or suborned perjury. *People v. Glasper*, 234 Ill. 2d 173, 207, 917 N.E.2d 401, 421 (2009). However, the State may challenge a defendant's credibility or the credibility of his theory of defense when evidence exists to support the challenge. *Glasper*, 234 Ill. 2d at 207, 917 N.E.2d at 421. The prosecutor's comments did not constitute plain error. The cases relied on by defendant involve much more disparaging comments by the prosecutor.

¶ 36 In the present matter, the prosecution's closing argument, viewed as a whole, was

a proper and fair commentary on evidence received at trial. Moreover, the trial court instructed the jury that closing arguments were not evidence and arguments not based on the evidence were to be disregarded. Thus, we find no plain error.

¶ 37 Defendant next argues the trial court erred when it denied defendant's motion to suppress in part. We disagree.

¶ 38 Prior to trial, defense counsel filed a motion to suppress defendant's statement to police. Defense counsel argued defendant's statement needed to be suppressed because defendant did not voluntarily waive his *Miranda* rights (see *Miranda v. Arizona*, 384 U.S. 436 (1966)), and defendant's request for a lawyer was ignored. The trial court concluded that defendant's statement was voluntarily given but that defendant's request for a lawyer had been ignored by the officers conducting the interview. Accordingly, only the portion of the interview which occurred prior to defendant's request for a lawyer was presented at trial.

¶ 39 We apply a bifurcated standard of review to a trial court's decision as to whether a defendant's confession was voluntary. We accord great deference to the trial court's findings of fact and will disturb them only if they are against the manifest weight of the evidence. *In re G.O.*, 191 Ill. 2d 37, 50, 727 N.E.2d 1003, 1010 (2000). However, we review *de novo* the ultimate question of whether the confession was voluntary. *G.O.*, 191 Ill. 2d at 50, 727 N.E.2d at 1010.

¶ 40 In determining whether a confession was voluntary, a reviewing court considers the totality of the circumstances. *In re G.O.*, 191 Ill. 2d at 54, 727 N.E.2d at 1012. "Factors to consider include the respondent's age, intelligence, background, experience, mental capacity, education, and physical condition at the time of questioning; the legality and duration of the

detention; the duration of the questioning; and any physical or mental abuse by police, including the existence of threats or promises." *G.O.*, 191 Ill. 2d at 54, 727 N.E.2d at 1012. No single factor controls. *G.O.*, 191 Ill. 2d at 54, 727 N.E.2d at 1012. "[T]he test of voluntariness is whether the defendant made the statement freely, voluntarily, and without compulsion or inducement of any sort, or whether the defendant's will was overcome at the time he or she confessed." *People v. Gilliam*, 172 Ill. 2d 484, 500, 670 N.E.2d 606, 613 (1996). The State must prove by a preponderance of the evidence that the defendant's confession was voluntary. *People v. Braggs*, 209 Ill. 2d 492, 505, 810 N.E.2d 472, 481 (2003).

¶ 41 Defendant contends that officers created a coercive environment and the totality of the circumstances surrounding defendant's statement to police rendered the statement involuntary. In determining whether a statement is voluntary, a court must consider the totality of the circumstances of the particular case; no single factor is dispositive. *People v. Richardson*, 234 Ill. 2d 233, 253, 917 N.E.2d 501, 514 (2009).

¶ 42 Though, at 17 years of age, defendant was young, he was nearly the age of majority, which in Illinois is 18 years of age (755 ILCS 5/11-1 (West 2006)). See *People v. Primm*, 319 Ill. App. 3d 411, 419, 745 N.E.2d 13, 22 (2000) (relevant for voluntariness inquiry that defendant was 16 years old and thus had "nearly reached majority age"). Moreover, defendant does not argue he lacked intelligence or normal mental capacity. Defendant was not under the influence of alcohol or drugs or suffering from any physical or emotional infirmities when he was taken into custody. Defendant's experience with the criminal justice system included: March 1999 for retail theft; November 1999 for criminal damage and criminal trespass; December 1999 for theft under \$300; January 2000 for retail theft; August 2000 for a stolen

bicycle; September 2000 for retail theft; and September 2003 for aggravated battery and disorderly conduct. Defendant had also served a term of probation for battery.

¶ 43 Although defendant had been handcuffed, the handcuffs were removed prior to the start of the interview. Defendant was provided something to drink and was offered the use of the restroom. Defendant's rights were read to defendant in full and defendant stated he understood those rights. Additionally, the interview lasted approximately one hour, which was not an unreasonable length of time.

¶ 44 Defendant argues officers created a coercive environment by telling defendant his uncle was upset and needed defendant to tell the truth, and repeatedly informing defendant that his uncle had implicated defendant in the crime. Further, officers repeatedly told defendant that some of what happened was "self-defense" and that defendant's actions were "justified." We do not find the atmosphere under which defendant was interrogated coercive. There was no evidence that the officers threatened or made any promises to defendant prior to or during the interview. Defendant had previous experience in the criminal justice system and he informed the officers that he understood his rights.

¶ 45 Defendant is correct that police deception is a factor to be considered when making a determination of voluntariness. Police deception, however, does not render a defendant's confession involuntary. See *People v. Martin*, 102 Ill. 2d 412, 427, 466 N.E.2d 228, 23 (1984) ("The deception, however, does not invalidate the confession as a matter of law. This circumstance, while relevant, is but one factor to consider when making a determination of voluntariness"). On the record before us, we find no indication that defendant's will was overborne such that any inculpatory statements were involuntary. In the present case, the totality

of the circumstances indicates that defendant's confession was voluntary.

¶ 46 Defendant next argues the trial court abused its discretion when it sentenced defendant to 40 years in prison because the court failed to adequately consider the factors in mitigation and defendant's rehabilitative potential.

¶ 47 Trial courts are given broad discretion in fashioning appropriate criminal sentences. *People v. Stacey*, 193 Ill. 2d 203, 209, 737 N.E.2d 626, 629 (2000). Absent an abuse of the court's discretion, we will not alter the sentence on review. *Stacey*, 193 Ill. 2d at 209–10, 737 N.E.2d at 629. Defendant was convicted of three counts of first degree murder (720 ILCS 5/9–1(a)(1), (a)(2) (West 2006)). The sentencing range for first degree murder is 20 to 60 years' imprisonment. 730 ILCS 5/5–8–1(a)(1)(1) (West 2006). The 40-year sentence imposed represents a mid-range sentence.

¶ 48 The record reflects the trial court did consider factors in mitigation and therefore, the court did not abuse its discretion in imposing sentence. The trial court stated it considered the presentence investigation (PSI) report, statutory factors in aggravation and mitigation, comments of counsel, the victim impact statements, and defendant's statement in allocution. The 40-year sentence was appropriate considering defendant's scant rehabilitative potential. According to the PSI report, defendant's criminal behavior began at age 10, and at age 11, defendant was on juvenile probation for battery. Defendant quit school after ninth grade and has never been employed. Defendant reported frequent use of drugs and alcohol. In light of defendant's penchant for criminal activity, the court did not abuse its discretion in rendering the statutorily permissible 40-year sentence.

¶ 49 For the reasons stated, we affirm the trial court's judgment. As part of our

judgment, we award the State its \$50 statutory assessment against defendant as costs of this appeal.

¶ 50 Affirmed.