

and battery (720 ILCS 5/12-3(a)(2) (West 2006)). The events culminating in these charges began when Diedre Murphy, the mother of the defendant's three children, called police to report that her home had been vandalized and she suspected that the defendant was responsible. Illinois State Troopers Brad Otten and Joshua Fergus responded to the call. According to the testimony at the defendant's trial, when Murphy showed them her residence and told them that she believed the defendant was responsible, Troopers Otten and Fergus began looking for the defendant but did not find him. Murphy's neighbor, Thomas Ledbetter, noticed the officers searching the neighborhood and asked who they were looking for. They told him they were looking for the defendant and asked Ledbetter to call them if he saw the defendant return. Ledbetter agreed to do so.

¶ 4 Later that evening, Ledbetter saw the defendant in front of Murphy's home. He called the police as he had agreed to do. Trooper Fergus responded to the call. When he arrived, he saw a man walking down the street. When the man saw the trooper, he ran away into a wooded area. Ledbetter came out of his home and told Trooper Fergus that he saw where the defendant had gone into the woods. Trooper Fergus ordered the defendant to come out of the woods. At first, he refused. When Trooper Fergus heard a neighbor's dog barking, he told the defendant that he would release his police dog if the defendant did not come out of the woods. At this point, the defendant complied. However, he resisted being handcuffed and placed in the squad car. Ledbetter helped Trooper Fergus handcuff the defendant and get him into the squad car. During the struggle outside the squad car, the defendant spat on Ledbetter. While he was inside the squad car, the defendant spat on Trooper Fergus. He also spat on the trooper's computer.

¶ 5 At trial, the State introduced into evidence a video recorded during the defendant's

ride to the police station. The recording does not have audio, and the video is of poor quality. However, at the end of the video, Trooper Fergus turned the camera towards his vehicle's computer to show the defendant's spit visible on the computer. Trooper Fergus did not take a similar shot of the spit on his shirt.

¶ 6 On cross-examination, Trooper Fergus indicated that the defendant made it difficult for him to drive the car by spitting on him. As a result of this testimony, defense counsel argued that the act of spitting in the police car could support a second charge of resisting a peace officer. Counsel asked that this be presented to the jury as an alternative to the aggravated battery charge. The court agreed.

¶ 7 During the jury instructions conference, the State made a motion *in limine* to bar defense counsel from arguing for jury nullification. Jury nullification is when a jury chooses to disregard the law and acquit a defendant or otherwise treat the defendant with leniency because jurors believe that they are achieving "true justice" by doing so. See *People v. Smith*, 296 Ill. App. 3d 435, 441, 694 N.E.2d 681, 685 (1998) (Steigmann, J., specially concurring). The prosecutor indicated that he did not know whether defense counsel intended to argue this, but he asked that she be prohibited from "either implicitly or explicitly asking the jury to take the law into [its] own hands" by finding the defendant guilty of the misdemeanor charge of resisting a peace officer rather than the felony charge of aggravated battery. He argued that it would be proper for defense counsel to argue that the State had failed to prove aggravated battery but would not be proper for her to argue that the jury should find the defendant guilty of the lesser charge "because that's what it seems like." In granting the motion *in limine*, the court told defense counsel, "You can't argue to the jury that they should give the defendant a break and just find him guilty of resisting a peace officer."

¶ 8 We will set out the relevant portions of both parties' closing arguments in some detail

because the defendant's arguments on appeal revolve around the prosecutor's arguments. In his closing argument, the prosecutor reminded jurors that defense counsel had told them during opening statements that there was no evidence that the defendant spat on either Trooper Fergus or Thomas Ledbetter. The prosecutor went on to say the following:

"I guess that's true if you buy the argument that the only kind of evidence is DNA evidence or pictures or videotape of the act being committed[,] but if those were the only kind of crimes that were ever proven ***, there wouldn't be much left to prosecute. We don't have to prove every case by DNA evidence."

¶ 9 In response, defense counsel told jurors that Trooper Fergus had training and experience as a police officer and that, as a result, he knew how to gather evidence and knew how important gathering evidence is to a criminal prosecution. Counsel pointed out that Trooper Fergus admitted that he did not gather any evidence in this case because he did not believe it was an important enough case. She then told jurors, "Well, my response to you is if he doesn't care, why should you?" She reminded jurors that the defendant was charged with aggravated battery, a serious felony, and asked, "How can collecting evidence for this charge not be important?" Defense counsel pointed out that Trooper Fergus "knew enough to turn the camera to the computer so that we could all see" that the defendant spat on the computer. She asked, "How difficult would it have been to *** turn the camera on himself to see the spit?" She also pointed out that it would not have been difficult for Trooper Fergus to have taken his shirt to the police lab for a DNA test on the spit.

¶ 10 Finally, defense counsel told jurors that if they did find that there was "some spitting," this act constituted resisting a peace officer because it made it difficult for Trooper Fergus to drive the defendant to the police station. She argued that if they were to

find him guilty of any charge, it should be resisting a peace officer, not aggravated battery.

¶ 11 In rebuttal, the prosecutor told jurors: "Most crimes don't get committed in front of cameras. In 99.999 percent of cases, DNA has nothing to do with it." The court sustained the defendant's objection to this statement, but only as to the precise percentage of cases that do not involve DNA evidence. The prosecutor then stated, "The majority of cases that get prosecuted in this country, this country, this State, have no DNA evidence in them." He next explained that eyewitness testimony *is* evidence.

¶ 12 The prosecutor went on to argue that the case was "all about" whether the jury believed that the defendant spat on Trooper Fergus and Thomas Ledbetter. He told jurors the following:

"What the defendant wants is, is for you to find him guilty *** of resisting a peace officer [instead of aggravated battery]. I know the alternative argument has been made that you [should] find that [the defendant] didn't spit on [Trooper Fergus], [but] that's not very plausible. He wants you to find him guilty of only resisting a peace officer. I ask that you not *reward* him in this way." (Emphasis added.)

¶ 13 At this point, defense counsel objected and asked for a sidebar. Counsel pointed out that, in ruling on the State's motion *in limine*, the court had specifically ordered her not to ask jurors to "reward" the defendant. She argued that while she did not do so, the prosecutor was arguing that she had. The court told the prosecutor, "You're suggesting [that] the defense has asked them to nullify." Defense counsel agreed and moved for a mistrial on that basis. The court sustained the objection but denied the motion for a mistrial.

¶ 14 Before allowing the prosecutor to continue his argument, the court instructed the jury as follows:

"Ladies and gentlemen of the jury, you have heard the prosecutor make some comments and references to what the defendant wants or [that] the defendant is asking the jury to return a verdict of resisting a peace officer rather than aggravated battery on Count I. The jury is instructed to disregard those comments and the jury is further instructed that *** the defendant is not requesting to be rewarded by the finding of guilty on the offense of resisting a peace officer instead of aggravated battery ***. *** And the jury is further instructed that making such a verdict ***, if the jury decides to do so, would not be a reward."

¶ 15 The jury returned verdicts of guilty on the three original charges (aggravated battery for spitting on Trooper Fergus in the police car, resisting a peace officer for failing to obey the instructions of a police officer and fleeing the scene on foot, and battery for spitting on Thomas Ledbetter outside the police car). The defendant filed a motion for a new trial. The court subsequently denied the motion and sentenced the defendant to four years in prison for the aggravated battery charge and 364 days in the county jail for each the other two charges, to be served concurrently. This appeal followed.

¶ 16 The defendant argues that he was denied a fair trial by the cumulative effect of two of the prosecutor's remarks. He first challenges the prosecutor's argument that the defendant was asking jurors to "reward" him by convicting him of resisting a peace officer for spitting in the car rather than aggravated battery. As previously noted, the court agreed with defense counsel that this argument implied that the defense was asking for jury nullification. The defendant also challenges the prosecutor's arguments relating to the use of DNA and photographic evidence. He contends that (1) by telling jurors that DNA evidence was not necessary, the prosecutor diminished or shifted the State's burden and (2) by telling jurors that DNA was not used in the

vast majority of cases, the prosecutor argued from facts not in evidence.

¶ 17 We first note that the parties disagree as to our standard of review on appeal. The defendant contends that we review the propriety of the prosecutor's arguments and whether improper remarks were sufficiently egregious to warrant reversal *de novo*. See *People v. Wheeler*, 226 Ill. 2d 92, 121, 871 N.E.2d 728, 744 (2007). The State argues that our standard of review is different for each of the two challenged remarks. The trial court overruled counsel's objection to the prosecution's remarks regarding the use of DNA evidence (except as to the precise percentage of cases that do not involve DNA). However, the court sustained the defendant's objection to the prosecutor's comments about "rewarding" the defendant by convicting him of a lesser offense and gave a curative instruction. The State contends that we review of the trial court's decision to deny the defendant's motion for a mistrial for a "clear abuse of discretion." See *People v. Nelson*, 235 Ill. 2d 386, 435, 922 N.E.2d 1056, 1083 (2009). The State further contends that the appellate court is divided as to the standard of review applicable to a trial court's ruling on objections to closing arguments. Some courts have reviewed such rulings *de novo*, while others have applied an abuse-of-discretion standard. See *People v. Hammonds*, 409 Ill. App. 3d 838, 863-64, ___ N.E.2d ___, ___ (2011); *People v. Phillips*, 392 Ill. App. 3d 243, 274, 911 N.E.2d 462, 493 (2009).

¶ 18 We need not fully resolve these arguments. The defendant contends that he was denied a fair trial by the cumulative effect of the challenged statements, and we do not believe it is possible to consider this argument by considering each statement alone as the State argues we must do. At the time the court denied the defendant's motion for a mistrial, the second challenged argument had yet to be made. Curative instructions are not always sufficient to cure the prejudice of improper argument.

People v. Williams, 333 Ill. App. 3d 204, 214, 775 N.E.2d 104, 112 (2002). In addition, even if one isolated statement is not prejudicial enough to deny a defendant a fair trial, the cumulative effect of multiple improper statements may be sufficient to warrant reversal. *People v. Quiver*, 205 Ill. App. 3d 1067, 1072, 563 N.E.2d 991, 995 (1990). Thus, it is possible for this court to find that the trial court acted within its discretion in denying the mistrial motion when it made that ruling after the first statement but still consider the cumulative effect of the two statements sufficient to warrant reversal. Moreover, we must consider challenged statements in the context of the entire closing arguments of both parties. *People v. Abadia*, 328 Ill. App. 3d 669, 683, 767 N.E.2d 341, 354 (2001).

¶ 19 More importantly, in this case we reach the same result regardless of the standard of review we apply—we do not find the cumulative effect of the two statements prejudicial enough to warrant reversal. Improper closing arguments only require reversal when the challenged arguments "substantially prejudice" the defendant. *People v. Whitlow*, 89 Ill. 2d 322, 341, 433 N.E.2d 629, 638 (1982); *Williams*, 333 Ill. App. 3d at 214, 775 N.E.2d at 113. This occurs when the remarks likely played a significant role in the defendant's conviction. *Wheeler*, 226 Ill. 2d at 123, 871 N.E.2d at 745. We do not believe the prosecutor's arguments here rise to that level.

¶ 20 Here, as previously noted, the prosecutor argued to jurors that convicting the defendant of resisting a peace officer, rather than aggravated battery, for spitting on Trooper Fergus in the police car would be "rewarding" him. The court agreed with defense counsel that this argument at least suggested that the defense was asking jurors to engage in jury nullification. It is never proper for a prosecutor to suggest that the defense has done something improper, such as asking jurors to disregard the law and engage in jury nullification. *Abadia*, 328 Ill. App. 3d at 679, 767 N.E.2d at

350.

¶ 21 Although the prosecutor's argument here was improper, we do not believe that it was prejudicial enough to require a mistrial. It is not clear that jurors would fully understand the implications of the statement. We note that the prosecutor did not explicitly state that defense counsel was asking jurors to reward the defendant; he told jurors that the defense wanted jurors to convict the defendant of the lesser charge, and then he told them that doing so would be rewarding him. While jurors might not like the idea of being asked to do something that might be construed as rewarding a criminal defendant, it is unlikely that they would interpret the prosecutor's statement as an insinuation that defense counsel was actually asking them to disregard the law. In addition, the court instructed jurors to disregard the prosecutor's statement, that the defense was not asking for the defendant to be rewarded, and that convicting him of resisting a peace officer for spitting in the car would not constitute a reward. In light of the very indirect nature of the prosecutor's argument, we find these instructions sufficient to cure any prejudice that might have stemmed from the improper argument.

¶ 22 We must still consider whether the defendant was prejudiced by the cumulative effect of the two statements. In so doing, we take into account the mitigating effect of the court's curative instructions. The defendant points to the prosecutor's arguments diminishing the importance of DNA and photographic evidence. He contends that these arguments were flawed for two reasons. First, he argues that by arguing that neither DNA nor photographic evidence was necessary, the prosecutor shifted the burden of proof to the defendant or at least diminished the State's burden. Second, he points out that no evidence was presented at trial relating to how often these types of evidence are used in criminal prosecutions. Thus, he contends, the argument was not

supported by the evidence presented in the trial.

¶ 23 We may easily reject the first contention. The prosecutor never argued that the State did not have to prove its case; he simply argued that the State was not required to prove its case with specific types of evidence. He pointed out that eyewitness testimony was evidence and argued that the testimony of Trooper Fergus was sufficiently credible to support a conviction. This argument accurately states the law and does not shift or diminish the State's burden of proof.

¶ 24 The defendant also complains that the prosecutor's arguments about how often DNA evidence is used in criminal prosecutions were based on evidence not in the record. We reiterate that the trial court sustained the defendant's objection to the precise percentage of cases that do not involve DNA evidence. Pointing out that many cases are proven without DNA simply appeals to jurors' common sense and (as noted) correctly states the law that no one specific type of evidence is necessary to prove a defendant guilty beyond a reasonable doubt. This argument came in response to defense counsel's assertion that the State had presented *no* evidence that the defendant spat on Trooper Fergus. The State was justified in countering this argument. See *Hammonds*, 409 Ill. App. 3d at 867, ___ N.E.2d at ___.

¶ 25 We also agree with the State that even if the prosecutor overstated the infrequency of DNA evidence, the comment was not so prejudicial that it denied the defendant a fair trial. Jurors were likely aware that DNA evidence, where available, is stronger than eyewitness testimony. They were likely also aware that DNA evidence is not always available. We are not persuaded that the jury was swayed by the prosecutor's statements even assuming they were improper.

¶ 26 Finally, we note that the defendant points to three notes sent by jurors to the court during deliberations. He contends that these notes indicated that jurors viewed the

evidence in the case as close. As such, he contends, it is especially important in this case that no improper prejudicial arguments be permitted to stand. See *People v. Ortiz*, 224 Ill. App. 3d 1065, 1073, 586 N.E.2d 1384, 1389 (1992). We disagree.

¶ 27 The jury sent one note asking to see the video recording from Trooper Fergus's vehicle. As previously noted, the video was of poor quality, so it is not surprising that jurors would want to view it a second time to see what it showed. The jury sent a second note asking if the charge of resisting a peace officer must be based on the specific conduct alleged in the charge. Again, there was reason for confusion on this matter. At the start of the trial, there was only one charge of resisting a peace officer (based on an allegation that the defendant fled the scene and did not obey the directions of an officer by failing to come out of the woods), and a second charge (based on the allegation that the defendant spit on Trooper Fergus in the police car and impeded his ability to drive) was added later. In the third note, the jury asked for a transcript of the trial. We do not find that these notes indicate that the jury found the evidence so closely balanced that the prosecutor's challenged arguments may have influenced its decision.

¶ 28 We conclude that the prosecutor's closing arguments in this case were not sufficiently prejudicial to warrant a mistrial or reversal of the defendant's convictions. Thus, we affirm his convictions.

¶ 29 Affirmed.