

No. 1-10-2855

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 08 CR 22966
)	
WILLIAM BAHENA,)	Honorable
)	Joseph M. Claps,
Defendant-Appellant.)	Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice R.E. Gordon and Justice Garcia concurred in the judgment.

ORDER

¶ 1 *Held:* Defendant was not denied the right to a fair trial by prosecutorial misconduct where all but one of his claims were procedurally defaulted, there was no error and/or defendant did not suffer prejudice. Further, trial counsel was not ineffective for failing to preserve the claims of alleged misconduct, entering into a stipulation concerning the testimony of the DNA expert or calling defendant's sister as a witness.

¶ 2 Following a jury trial, defendant William Bahena was convicted of first degree murder and sentenced to 36 years' imprisonment. On appeal, defendant contends that six separate instances of prosecutorial misconduct individually and cumulatively served to deny him his right to a fair trial. He further contends that he received ineffective assistance of counsel. For the reasons that follow, we affirm.

¶ 3 Defendant's conviction arose from the stabbing death of Elva Diaz, the mother of his three children. The parties do not dispute that on October 21, 2008, defendant and Diaz engaged in an altercation in the vestibule of her apartment. Defendant's theory of the case was that Diaz's resulting death was accidental. At trial, the State introduced evidence that Priscilla Bahena, the 12-year-old daughter of defendant and Diaz, witnessed the incident and called 911. In addition to having Priscilla testify, the State, over defense objection, introduced portions of the recording of her 911 call.

¶ 4 The State's first witness at trial was Rosario Aranda, a police communications operator. Aranda testified that at 7:09 p.m. on October 21, 2008, she took a 911 call regarding a woman being attacked. The caller, who was hysterical, eventually identified herself as Priscilla Bahena and gave Aranda an address.

¶ 5 Priscilla Bahena testified that on the date in question, she lived with her mother, younger brother and younger sister in the second-floor apartment of a two-story building. Defendant had not been living with them for two or three weeks. Around 3:45 p.m., the doorbell rang. Priscilla, who was watching her siblings until her mother arrived home from work, went downstairs to open the door. She could see defendant through the window and let him in, even though her mother had told her not to do so.

¶ 6 Priscilla and defendant went upstairs, where the children showed defendant their school work and tests. At some point, Priscilla had a conversation with defendant about Diaz. Among other things, defendant asked whether Diaz had a boyfriend. Priscilla told him Diaz did not. Defendant also asked where the children slept when Diaz went to parties, to which Priscilla replied that they stayed at coworkers' houses. Priscilla told him the coworkers were men and women, but that none of the men was Diaz's boyfriend. When defendant asked about sleeping arrangements, Priscilla told him they would sleep on the couch or in an extra bedroom and that she did not see her mother with any of the men.

¶ 7 Shortly after this conversation, Priscilla heard Diaz banging on the door and screaming her name. Priscilla started down the stairs, but defendant told her to stay where she was. Priscilla explained at trial that she stayed on the third stair and was able to see downstairs to the front door. Defendant went all the way down the stairs and opened the door. Diaz came inside and asked defendant why he was there. Defendant responded by asking whether they "could talk about it," but Diaz told him to get out.

¶ 8 Priscilla testified that Diaz was yelling and defendant pushed her against the door with his forearm against her neck. Diaz gasped for breath. The next thing Priscilla knew, Diaz was on the floor on her back. Defendant was hovering over Diaz, and it looked to Priscilla like he was holding Diaz's neck. Diaz had been screaming Priscilla's name, and when she stopped, Priscilla went downstairs. Defendant was standing over Diaz. Priscilla started hitting defendant on the back and telling him to stop.

¶ 9 Priscilla's younger brother came downstairs with a curtain rod and asked if everything was okay. Priscilla sent him back upstairs and called 911 from her cell phone. She told the person who answered the phone what was happening. Diaz was on the floor, not moving or saying anything. Defendant told Priscilla to give him the phone, but she refused and ran upstairs.

¶ 10 Priscilla testified that she saw defendant come upstairs to the kitchen and retrieve a long knife from near the sink. When defendant went back downstairs, she followed, all the while relating the events to the person on the phone. Back at the bottom of the stairs, defendant was hovering over Diaz, who was still lying on the floor. Priscilla could see the knife in defendant's hands. She testified that his hands were near Diaz's neck and were moving back and forth. At that point, Priscilla heard an ambulance siren. Defendant said, "Oh, shit," opened the door, and left with the knife. She heard his car screeching away. Priscilla testified that she never saw anything in Diaz's hands, and did not see her reach into or take anything out of her purse.

¶ 11 After defendant left, Priscilla turned on the hallway lights. She saw Diaz's body on the

floor. Priscilla related that Diaz's eyes were crossed, she had urinated on herself, and there was blood on the floor. Priscilla put her hand to Diaz's neck to see if she had a pulse, but she could not tell because there was blood on her fingers. Priscilla felt queasy and put her hand on the wall. Priscilla's siblings came downstairs and eventually, all three children went outside. Paramedics who arrived at the scene took the children to a neighbor's house. The following morning, Priscilla learned her mother had died.

¶ 12 Chicago Fire Department paramedic Heather Peace testified that shortly after 7 p.m., when she and her partner arrived at the scene, Priscilla and two other children were standing outside. A fireman gathered the children and led them away from the area while Peace, her partner and another fireman went inside. In the front foyer, they found Diaz lying on her back, unconscious. She was not breathing, had no pulse and had several stab wounds in and around her chest and neck. Diaz was transported to the hospital but did not regain any vital signs.

¶ 13 Chicago police detective Greg Swiderek testified that he was assigned to investigate Diaz's homicide on October 21, 2008. When he and his partner arrived on the scene shortly before 8 p.m., Diaz had already been transported to the hospital. In the vestibule, they found a pair of women's shoes, a purse and some items from the purse strewn around the floor. Detective Swiderek also noted blood spatter on the floor and the walls.

¶ 14 After leaving the scene and interviewing witnesses, Detective Swiderek identified defendant as a suspect. He put out a message on the police radio describing defendant's car. Assisting officers went to two nearby addresses, but the police were unsuccessful in their search for defendant at that time.

¶ 15 In the course of his investigation, Detective Swiderek learned defendant's cell phone number and obtained a register of incoming and outgoing calls identifying the locations from which the phone was being used. On October 22, 2008, the phone was used at 5:47 p.m. near a cellular tower in Oklahoma, and at 9:38 p.m. near a tower in Texas. The next day, the phone was

used three times in New Mexico. Detective Swiderek obtained an arrest warrant for defendant. On October 29, 2008, he learned that defendant had been arrested by police in New Mexico. Detective Swiderek and his partner traveled to New Mexico, placed defendant in custody and transported him back to Illinois.

¶ 16 The parties stipulated that if called as a witness, Andrew Garinger, a forensic scientist with the Illinois State Police, would testify that he conducted DNA analysis on a buccal swab standard taken from defendant and obtained a DNA profile suitable for comparison purposes. He also received fingernail clippings that were collected from Diaz's hands during her post-mortem examination. From the clippings, he collected possible cellular material on which he conducted "Polymerase Chain Reaction, Short Tandem Repeat" DNA analysis. A mixture of DNA profiles was identified from the left-hand sample: Garinger identified a female DNA profile from which Diaz could not be excluded, as well as a male DNA profile that did not contain enough information to either exclude or imply a positive association with defendant. With regard to the right-hand fingernail clippings, Garinger determined there was not enough male DNA present to proceed with standard DNA analysis. He recommended that the samples from both hands be transferred for additional testing.

¶ 17 The parties next stipulated to the testimony of Lisa Fallara, a forensic scientist with the Illinois State Police with expertise in Y-chromosome DNA analysis. Fallara conducted Y-chromosome DNA analysis on the buccal swab standard collected from defendant and obtained a profile suitable for comparison purposes. She conducted Y-chromosome DNA analysis on the left-hand fingernail sample collected from Diaz and identified a mixture of profiles consistent with having originated from two males. A major profile was identified which matched defendant's and would be expected to occur in 1 in 1,400 unrelated African-American males, 1 in 1,700 unrelated Caucasian males, or 1 in 970 unrelated Hispanic males. Fallara also conducted Y-chromosome DNA analysis on the right-hand fingernail sample. From that sample, she

identified a mixture of profiles consistent with having originated from two males, from which defendant could not be excluded from having contributed. The mixed profile would be expected to occur in approximately 2.32 percent of unrelated males. Finally, the parties stipulated that if called, Fallara would have testified that she was not requested to analyze any other physical evidence by the State or defense and was not directed to do so by the court.

¶ 18 Dr. Ponni Arunkumar, an assistant medical examiner, testified that she witnessed the autopsy of Elva Diaz, which was performed under her supervision by another doctor. External examination revealed multiple injuries to Diaz's neck, face, upper chest and left hand. Specifically, there were four stab wounds to the neck, one to the face, two to the upper chest and one to the left hand. The stab wound on the back of the left middle finger was characterized as a defensive wound, which, according to Dr. Arunkumar, occurs "where a person is trying to ward off an attack with their hands and they get injuries on their hands." While there was no external evidence of strangulation, Dr. Arunkumar testified that strangulation can occur without leaving any marks or bruising on the neck. Dr. Arunkumar determined that the cause of Diaz's death was multiple stab wounds.

¶ 19 Defendant testified on his own behalf. He stated that he and Diaz had an on-again, off-again relationship for 13 years, during which they lived together except for a couple of months. In the course of their relationship, defendant and Diaz had "many, many, many verbal altercations." Sometimes, defendant and Diaz would get physical when they argued. Defendant estimated that the arguments would escalate to physical altercations about 20 to 30 percent of the time. He related that one time, Diaz hit him on the head with a wooden board, leaving scars on his forehead. In October 2008, defendant and Diaz were not living together. However, defendant would go to the apartment around 2:45 or 3 p.m. every day during the week to see their children.

¶ 20 On the day in question, defendant arrived at the apartment about 3:30 or 3:40 p.m. and let

himself in with his key. After he called out to the children, Priscilla ran down the stairs and greeted him with a hug and a kiss. Defendant and Priscilla went upstairs, where defendant talked with the children about their homework and how they were doing. Defendant also talked with Priscilla about where they spent their time with Diaz because he had overheard them talking about staying at other people's houses.

¶ 21 At some point, the children reported to defendant that someone was banging on the door downstairs. He told them to stay upstairs and went to see who it was. As defendant descended the stairs, he recognized Diaz's voice, screaming outside the door. Defendant opened the door and Diaz came into the vestibule. He described her demeanor as excited, aggressive and angry, and stated that he felt threatened by her. Defendant testified that Diaz yelled at him and asked him why he was at the apartment. He tried to calm her down and asked whether he could take the children to the movies, but she said no and told him to leave.

¶ 22 Defendant testified that Diaz called for Priscilla, who came to the top of the stairs, and told her to call the police. Defendant told Priscilla not to call and indicated to Diaz that he would leave. Diaz started yelling obscenities at defendant and hit him on top of his head. Defendant described the blow as a slap with an open hand. Defendant testified that Diaz swung at him "maybe two more times" and then blocked the doorway so he could not leave. Diaz told defendant that if he wanted to play games, she could play games too. She reached for a purse hanging on a hook in the vestibule and retrieved a knife with a seven-inch blade.

¶ 23 Defendant testified that Diaz lunged at him with the knife, so he pushed her up against the wall. A struggle ensued. While Diaz was holding the knife, defendant grabbed her hand so that the knife was pointing upwards. At that point, he and Diaz "just got into like a tussle." Defendant stated that things happened fast, and the next thing he knew, Diaz had collapsed to the ground. Defendant denied strangling Diaz and stated that during the struggle, he was trying to protect himself by taking the knife away from Diaz. He never saw the tip of the knife touch

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Diaz's neck.

¶ 24 After Diaz collapsed, defendant went into a state of panic and shock. He heard Priscilla on the phone, sounding excited, confused and delirious. When Priscilla came down the stairs, he asked her for the phone, but she refused and yelled at him. Then Priscilla saw the knife on the floor and ran back upstairs, screaming, "He has a knife." Defendant went upstairs to look for his cell phone so he could call 911 and get medical attention for Diaz. After retrieving his phone, defendant went back downstairs, followed by the children. He heard sirens coming and "figured it was probably the ambulance." Concluding that Priscilla's call must have been to 911, he left through the front door.

¶ 25 Defendant got into his car and drove away. He was panicked, scared and confused. He did not know where he was going and did not know what happened to the knife. Defendant called his sister, Nadine Bahena, a few minutes after he started driving and asked her a question. At some point during the drive he learned that Diaz had died. Eventually, defendant drove through Oklahoma and ended up in New Mexico, where he had relatives. After talking with his relatives, defendant turned himself in to the local police.

¶ 26 On cross-examination, defendant reiterated that he and Diaz had many arguments in the past and that they had sometimes become physical. He denied ever having hit Diaz but admitted having pushed her. Defendant also agreed that the police had responded to some of those physical altercations. The prosecutor asked defendant whether the police had arrested him, and not Diaz, on those occasions, but defense counsel objected and the trial court sustained the objection.

¶ 27 Defendant further testified on cross-examination that the only injuries he sustained during the struggle with Diaz were a few scratches on his head. The prosecutor asked defendant, "Did you tell the police when they came to get you that you had scratches on your head?" Defense counsel objected, but the trial court overruled the objection, and defendant answered in the

negative. Defendant also stated that he did not ask anyone to take photographs of the scratches.

¶ 28 After presenting his own testimony, defendant called three witnesses to testify as to his reputation in the community as a peaceable person.

¶ 29 Finally, defendant called his sister, Nadine Bahena, to testify. Nadine, a Chicago police officer, testified that on the date in question, defendant called her at 7:13 p.m. As a result of that phone call, she went to the apartment to check on her nieces and nephew. When she saw the children, Priscilla was upset. Nadine spoke with Priscilla but was unable to get coherent answers to her questions. The next day, Nadine spoke with defendant and told him Diaz had died. Nadine testified further that defendant had a reputation in the community for being a peaceable person.

¶ 30 On cross-examination, Nadine testified that when defendant made his first phone call to her, defendant told her he and Diaz had "got into it again." When Nadine asked him what happened, he did not answer. He also did not say that Diaz had a knife. The prosecutor asked whether defendant said he was injured, but the trial court sustained defense counsel's objection to the question. Over another defense objection, Nadine testified that defendant did not tell her that Diaz had attacked him. With regard to her second telephone conversation with defendant, Nadine testified that she repeatedly asked defendant where he was, but he did not respond. Defendant asked about Diaz's condition, and when she told him Diaz had died, defendant said, "Oh my God" and the call was disconnected. Over defense objection, Nadine testified again that defendant did not tell her that Diaz had attacked him.

¶ 31 The jury found defendant guilty of first degree murder. The trial court entered judgment on the verdict and subsequently sentenced defendant to 36 years in prison.

¶ 32 On appeal, defendant's first contention is that six separate instances of prosecutorial misconduct individually and cumulatively served to deny him his right to a fair trial. Specifically, he argues that the prosecution improperly (1) introduced an inflammatory portion of

Priscilla's 911 call; (2) misrepresented the findings of Lisa Fallara, the DNA forensic scientist, during closing argument; (3) argued in rebuttal closing that the murder was "burned into every corner of [Priscilla's] brain; (4) asked defendant whether he had been arrested during any past altercations with the victim; (5) asked defendant whether he told the police when he was arrested that he had scratches on his head; and (6) commented during closing argument on defendant's courtroom demeanor.

¶ 33 The State asserts that defendant has forfeited most of these claims. We agree. In order to preserve a claim for appellate review, a defendant must object at trial and raise the issue in a posttrial motion. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988). Here, defendant did not object at trial to the prosecutor's statement regarding the DNA evidence or to the comment regarding Priscilla's memory of the incident. In addition, with the exception of the argument regarding the 911 call, the posttrial motion did not specifically raise any of the above issues. We are mindful that the motion for a new trial included a general assertion that the prosecutor "made prejudicial, inflammatory and erroneous statements in closing argument designed to arouse the prejudices and passions of the jury, thereby prejudicing the defendant's right to a fair trial." However, such general, "boilerplate" language is not sufficiently specific to preserve alleged errors for review. *People v. Jones*, 240 Ill. App. 3d 213, 226 (1992).

¶ 34 Defendant acknowledges his failure to preserve the above issues but argues we should reach them via plain error analysis or, in the alternative, because trial counsel was ineffective.

¶ 35 The plain error doctrine allows us to review a forfeited issue affecting substantial rights in either of two circumstances: (1) where the evidence is so closely balanced that the verdict may have resulted from the error and not the evidence; or (2) where the error is so serious that the defendant was denied a substantial right and thus a fair trial. *People v. Herron*, 215 Ill. 2d 167, 178-79 (2005). However, before reaching either prong of the plain error test, we must first determine whether error occurred. *People v. Lewis*, 234 Ill. 2d 32, 43 (2009).

¶ 36 In determining whether error occurred, we turn first to defendant's arguments regarding closing arguments. Prosecutors are given wide latitude when making closing arguments. *People v. Wheeler*, 226 Ill. 2d 92, 123 (2007). Reversal based on closing argument is warranted only if a prosecutor made improper remarks that constituted a material factor in the defendant's conviction. *Wheeler*, 226 Ill. 2d at 123. In closing, the State may comment on the evidence presented and draw reasonable inferences therefrom. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2005). Additionally, during rebuttal, the State may respond to comments made by the defendant which invite a response. *People v. Kliner*, 185 Ill. 2d 81, 154 (1998).

¶ 37 The appropriate standard of review for closing arguments is currently unclear. In *People v. Wheeler*, 226 Ill. 2d 121 (2007), our supreme court applied a *de novo* standard of review to the issue of prosecutorial statements during closing arguments. However, the *Wheeler* court cited with favor its decision in *People v. Blue*, 189 Ill. 2d 99, 128 (2000), which applied an abuse of discretion standard. We need not resolve the issue of the proper standard of review here, as our holding would be the same under either standard. See *People v. Salas*, 2011 IL App (1st) 091880, ¶ 102 (acknowledging conflict regarding standard of review).

¶ 38 Defendant argues that the prosecutor misrepresented the findings of Lisa Fallara, the DNA forensic scientist, during closing argument when the prosecutor made the following statement:

"Remember the stipulation you heard with all the crazy science language in it? The DNA underneath her fingernails, he can't be excluded from that. There's a one in 14 hundred probability that somebody with his DNA profile ended up under her fingernails."

As defendant points out, the stipulated testimony was that the Y-chromosome DNA profile extracted from Diaz's left-hand fingernail, which matched defendant's profile, would be expected to occur in 1 in 1,400 unrelated African-American males, 1 in 1,700 unrelated Caucasian males,

or 1 in 970 unrelated Hispanic males. The presentence investigation report indicates that defendant is not African-American. Therefore, the prosecutor's reference in closing argument to a 1-in-1,400 probability was inaccurate.

¶ 39 Nevertheless, the prosecutor's statement does not rise to the level of plain error. There was no question at trial that defendant and Diaz engaged in an altercation. Defendant himself testified that Diaz slapped him and that he suffered "a few scratches" on his head from their struggle. Even under defendant's version of events, there was reason for his DNA to be present under Diaz's fingernails. In these circumstances we cannot say that the jury's verdict resulted from the prosecutor's misstatement and not the evidence, or that the misstatement was so serious that defendant was denied a fair trial. See *Herron*, 215 Ill. 2d at 178-79. The argument remains forfeited.

¶ 40 Defendant next claims that the prosecutor improperly misstated the evidence when, during rebuttal closing, she stated in reference to Priscilla's having witnessed Diaz's death, "Her name is Priscilla Bahena, and she's not a defective camera. She's a 12-year-old girl who watched her father, this guy, brutally stab her mother and kill her. She's a 12-year-old girl who watched that horrific event unfold. And do you think for a second that it isn't burned into every corner of her brain because it is." Defendant asserts that Priscilla never testified that the incident was "burned into every corner of her brain," or even that she remembered it very well. Accordingly, defendant argues that the prosecutor improperly referred to evidence that was not supported by the record.

¶ 41 We believe the prosecutor's comment was a reasonable inference from the evidence that was invited by defendant's own closing argument. In closing, defense counsel characterized Priscilla as a "defective camera recording this event." Counsel argued that Priscilla "didn't get everything right" and urged the jury not to rely 100 percent on her memory, as a 12-year-old would not have the ability to "remember what they're looking at, keep it up in the storage

compartment of their heads and give it back to us 18 months later at a trial." Given these statements by defense counsel, it was reasonable for the prosecutor to respond that Priscilla was not a "defective camera." It was also reasonable for the prosecutor to argue that Priscilla's memory of the event was reliable, as her trial testimony reflected that she witnessed the entire incident between her parents. Viewing the prosecutor's remarks within the context of the entirety of the closing argument, we find that the complained-of comments do not fall outside the wide latitude given to the State during closing argument. See *Wheeler*, 226 Ill. 2d at 122-23. Defendant's claim of error fails and, absent error, we need not engage in plain-error analysis. *Lewis*, 234 Ill. 2d at 43.

¶ 42 Defendant's final claim with regard to closing argument is that the prosecutor impermissibly offered her own testimonial commentary on his demeanor when she commented, "I really hope you were watching the defendant's demeanor when his daughter struggled to testify because I was. I watched him, and he sat there emotionless." Defendant argues that the prosecutor's comment violated the "advocate-witness rule."

¶ 43 In support of this argument, defendant relies solely upon *People v. Blue*, 189 Ill. 2d 99, 136-37 (2000). In *Blue*, two prosecutors interviewed the mother of the defendant's children after a warrant had issued for her arrest. *Blue*, 189 Ill. 2d at 110, 134. The same two prosecutors then tried the State's case against the defendant. *Blue*, 189 Ill. 2d at 134. When the State called the woman as a witness at trial, the prosecutors made comments during her testimony that offered the jury a simultaneous rebuttal to the woman's account of what happened during their pretrial interview. *Blue*, 189 Ill. 2d at 137. Our supreme court found that the prosecutors' comments were improper attempts to introduce contrary evidence through themselves that violated the advocate-witness rule, which bars attorneys from serving in dual roles of attorney and advocate in the same proceedings. *Blue*, 189 Ill. 2d at 136.

¶ 44 Here, unlike *Blue*, the prosecutor's comment did not serve to rebut any evidence offered at

trial. The prosecutor was not attempting to offer her own account of an event. Rather, the prosecutor directed the jury members' attention to defendant's demeanor, a factor about which the prosecutor had no more knowledge than the jury. We cannot find that the prosecutor violated the advocate-witness rule. Defendant's claim of error fails and again, absent error, we need not engage in plain-error analysis. *Lewis*, 234 Ill. 2d at 43.

¶ 45 We next turn to defendant's forfeited arguments regarding cross-examination.

¶ 46 Defendant argues that the State committed misconduct when, in cross-examining him, the prosecutor told the jury that he had prior arrests for domestic battery against Diaz. Defendant asserts, without citation to authority, that "this sort of evidence is clearly inadmissible." He further asserts that the prosecutor's comment was highly prejudicial and that defendant did not open the door to the admission of his criminal history by choosing to testify.

¶ 47 The prosecutor's question arose in the following context. On direct examination, defendant testified that he and Diaz had "many, many, many" verbal altercations in the past and had sometimes "gotten physical" with each other. Defendant estimated that the arguments became physical 20 to 30 percent of the time and testified that Diaz once hit him on the head with a wooden board, leaving scars on his forehead. On cross-examination, defendant denied having ever hit or struck Diaz but admitted to having pushed her. Defendant also acknowledged that the police had responded to some of their altercations. The prosecutor then asked, "And, in fact, the police arrested you during those altercations, not [Diaz], correct?" Defense counsel objected to the question, and the trial court sustained the objection and directed the jury to disregard the question.

¶ 48 Assuming that the prosecutor's question was error, we cannot find that it rises to the level of plain error. "Generally, the prompt sustaining of an objection by a trial judge is sufficient to cure any error in a question or answer before the jury." *People v. Alvine*, 173 Ill. 2d 273, 295 (1996). Here, the trial court promptly cured any prejudicial impact caused by the prosecutor's

question by sustaining defendant's objection and ordering the jury to disregard it. Further, during jury instructions, the trial court also admonished the jury to disregard questions to which objections were sustained. Accordingly, any arguable error in the prosecutor's question was cured by the trial court's actions and defendant suffered no prejudice. See *People v. Jacobs*, 405 Ill. App. 3d 210, 220 (2010) (trial court's actions cured any error in prosecutor's questions). The issue is forfeited.

¶ 49 Defendant's next argument is that the prosecutor impermissibly shifted the burden of proof by commenting on his post-arrest invocation of his right to silence when she asked him on cross-examination, "Did you tell the police when they came to get you that you had scratches on your head?" In support of his argument, defendant relies solely upon *People v. Nolan*, 152 Ill. App. 3d 260, 268 (1987).

¶ 50 In *Nolan*, the defendant was convicted of the shooting death of his wife. *Nolan*, 152 Ill. App. 3d at 261, 263. At trial, the defendant testified as to a version of events in which the shooting was accidental. *Nolan*, 152 Ill. App. 3d at 262. Over defense objections, two police officers testified that after the defendant was arrested, he did not answer direct questions as to what happened at the scene of the shooting. *Nolan*, 152 Ill. App. 3d at 262, 265. During closing, the prosecutor argued that if the victim's death had resulted from the accidental firing of a gun, the defendant would have so stated when he spoke with the police operator or when he called his brother-in-law from the police station. *Nolan*, 152 Ill. App. 3d at 263.

¶ 51 On appeal, this court reversed, finding that evidence of the defendant's silence was elicited by the prosecution and intentionally exploited in closing argument. *Nolan*, 152 Ill. App. 3d at 266. We held that the police officers' testimony, taken as a whole and in light of the State's closing argument, abused the defendant's right to remain silent and should not have been admitted for impeachment purposes. *Nolan*, 152 Ill. App. 3d at 266.

¶ 52 *Nolan* is distinguishable from the case at bar. Here, the prosecutor's question was not an

attempt to characterize defendant's post-arrest silence as a tacit admission of guilt. After posing the challenged question, the prosecutor went on to ask defendant whether he had asked anyone to take photographs of the scratches on his head. Given this context, we agree with the State that the prosecutor was attempting to show that there was no evidence to corroborate defendant's claim that he and Diaz were involved in a mutual struggle. Unlike *Nolan*, the State here did not mention or refer to defendant's silence during closing argument. We find no error in the prosecutor's question.

¶ 53 Defendant's claims of prosecutorial misconduct do include one properly-preserved argument: that the prosecution improperly introduced an inflammatory portion of Priscilla's 911 call, *i.e.*, "loud blood chilling screams." Defendant asserts that the State "played a portion of the 911 call that the court ruled it was not allowed to play to the jury, in accordance to the court's initial ruling." Defendant acknowledges that the trial court sustained his objection to the State's initial playing of the recording and directed the jury to disregard that portion of the recording. Defendant still asserts that "it surely must have been difficult for jurors to disregard 'loud, blood chilling screams' from a 12-year old girl" and maintains that a curative instruction will not always cure improper prosecutorial misconduct.

¶ 54 Prior to trial, the State filed a motion *in limine* seeking to admit a recording of Priscilla's 911 call. The trial court held a hearing on the motion, listened to the recording in its entirety and eventually ruled that the State could play "the excited utterance part" of the recording. The parties thereafter met with the trial court in chambers to "skull out" allowable portions of the recording. As a result of that meeting, the State intended to play three separate clips.

¶ 55 During the testimony of the 911 operator, the State played the first portion of Priscilla's 911 call, using a CD. After the jury heard the clip, defense counsel objected. The trial court ordered the first portion stricken and admonished the jury to disregard it. The State then played a second portion of the recording from the CD, after which the trial court had the jury taken out of

the courtroom and directed the parties "to get this right" in the next hour.

¶ 56 When the trial court reconvened with the attorneys in the courtroom, defense counsel related that the State had reduced the decibel level of the recordings, which made them "much better." The trial court responded that the issue it had with the recordings was that it "couldn't understand a word except for loud blood chilling screams," and stated, "That's not what I heard when the parties and I heard the clips in chambers." The State replayed the first two clips on CD, but the trial court still indicated that it could not make out what Priscilla was saying on the recordings.

¶ 57 At this point, one of the prosecutors suggested that they play the recording from a laptop computer, as they had in chambers, since it had been easier for everyone to hear the recording using that equipment. The State played the clips for the trial court, which indicated that the recording was now intelligible. The trial court also stated, "I can clearly hear what she's saying in the same manner, in the same form when we were all in chambers, which is why I let it in." When proceedings reconvened in front of the jury, the State played the recording of the 911 call from the laptop computer.

¶ 58 After examining the record closely, we find that contrary to defendant's argument, the State did not publish to the jury a portion of the recording that the trial court had ruled it was not allowed to play in court. Rather, the State initially played an approved portion of the recording on equipment that made the recording unintelligible. Once the State switched to playing the recording on a laptop computer, it became apparent that the selected portions of the recording were the same ones the trial court had deemed admissible. Accordingly, the State did not commit prosecutorial misconduct in playing the recording to the jury. Defendant's argument is unpersuasive.

¶ 59 The six instances of alleged prosecutorial misconduct identified by defendant in this appeal did not deny him his right to a fair trial, either individually or collectively. Defendant's

claims of prosecutorial misconduct, whether during cross-examination or closing argument, fail on appeal.

¶ 60 Defendant next contends that he was denied his constitutional right to the effective assistance of counsel. The standard for a claim of ineffective assistance of counsel has two prongs: deficient performance and prejudice. *Strickland v. Washington*, 466 U.S. 668, 685 (1984). First, a defendant must demonstrate that counsel's representation fell below an objective standard of reasonableness. *Strickland*, 466 U.S. at 688. In order to establish this prong, the defendant must overcome the strong presumption that the challenged action or inaction may have been the product of sound trial strategy. *People v. Smith*, 195 Ill. 2d 179, 188 (2000). Second, a defendant must establish prejudice by showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" is a probability sufficient to undermine confidence in the outcome. *Strickland*, 466 U.S. at 694. If a case may be disposed of on one *Strickland* prong, this court need not review the other. *People v. Irvine*, 379 Ill. App. 3d 116, 129-30 (2008).

¶ 61 Defendant argues that his trial counsel was ineffective in three ways: (1) for failing to object to impermissible actions by the prosecution; (2) for stipulating to evidence that shifted the burden of proof; and (3) for calling a witness who offered seriously damaging evidence against him. We address the arguments in turn.

¶ 62 First, defendant asserts that to the extent any of his claims of prosecutorial misconduct were not preserved for review due to counsel's failure to make a timely objection and/or include such error in a posttrial motion, the claims of misconduct should be addressed in the context of ineffective assistance of counsel. We have already determined that each of defendant's forfeited claims of prosecutorial misconduct either did not involve error or did not rise to the level of plain error. In the instances where there was no error, counsel was not ineffective for failing to preserve the issues for review. In the other instances, we determined that defendant suffered no

prejudice from the alleged instances of prosecutorial misconduct. Absent prejudice, defendant was not denied the effective assistance of counsel. See *People v. Clay*, 379 Ill. App. 3d 470, 485 (2008) (where the defendant was not prejudiced by counsel's failure to preserve an issue of prosecutorial misconduct, his claim of ineffectiveness failed).

¶ 63 Next, defendant argues that counsel's performance was objectively unreasonable because he entered into a stipulation that Lisa Fallara, the forensic expert who performed the Y-chromosome DNA analysis in the case, "was not requested to analyze any other physical evidence by the State, defense nor was she directed to do so by this court." Defendant asserts that this stipulation shifted the burden of proof in that it introduced evidence of defendant's failure to have physical evidence tested.

¶ 64 We find that defendant has failed to establish the prejudice prong of the *Strickland* test. Defendant has not explained how it prejudiced him to have the jury told that he did not ask Fallara to perform further DNA testing. Testing of physical evidence was not an integral part of the defense. Rather, the case rested on Priscilla's and defendant's testimony. Defendant has not shown a reasonable probability that, but for counsel's entering into the above stipulation, the result of the proceeding would have been different. The claim of ineffectiveness fails.

¶ 65 Finally, defendant argues that counsel was ineffective in calling his sister, Nadine Bahena, as a defense witness, as doing so resulted in opening the door to his pre-arrest silence. According to defendant's argument, defense counsel's decision to call Nadine could not possibly have been based on sound legal strategy. Defendant asserts that counsel called Nadine "for some unknown reason" and that the intended purpose of Nadine's testimony "is difficult to discern." He further argues that the resulting harm of presenting her as a witness was clear because she offered damaging testimony of his failure to offer a self-defense claim while he was on the run.

¶ 66 In general, the decision whether to present a particular witness is a matter of trial strategy that will not support a claim of ineffective assistance of counsel. *People v. English*, 403 Ill. App.

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3d 121, 138 (2010). Contrary to defendant's assertions, defense counsel's purpose in calling Nadine as a witness is not a mystery. Counsel specifically indicated to the trial court that he was calling Nadine as a witness to testify as to defendant's reputation and to rebut the State's intimations that he did not care about his children and completely abandoned them when he fled the scene. We are unwilling to find that counsel's decision to present Nadine as a witness was unreasonable simply because the State benefitted from cross-examining her.

¶ 67 A defendant is entitled to reasonable, not perfect, representation, and the fact that counsel's chosen strategy proves unsuccessful does not establish a claim of ineffective assistance. *People v. Fuller*, 205 Ill. 2d 308, 331 (2002). Defendant has not overcome the strong presumption that counsel's decision to present Nadine as a witness was the product of sound trial strategy. Because defendant has failed to establish that trial counsel's performance was deficient, we need not consider whether prejudice resulted from counsel's actions. Defendant's claim of ineffective assistance of counsel fails.

¶ 68 For the reasons explained above, we affirm the judgment of the circuit court of Cook County.

¶ 69 Affirmed.