2011 IL App (3d) 091048-U

Order filed September 27, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the Circuit Court of the 12th Judicial Circuit, Will County, Illinois
Plaintiff-Appellee,	)	
v.	)	Appeal No. 3-09-1048
	)	Circuit No. 07-CF-1580
MICHAEL L. BERRY,	)	
Defendant-Appellant.	)	Honorable Daniel J. Rozak, Judge, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justices McDade concurred in the judgment.
Justice Wright specially concurred.

ORDER

¶ 1 *Held*: The State adduced sufficient evidence at trial to prove defendant guilty beyond a reasonable doubt. The jury instructions given did not confuse the jury or infringe upon defendant's right to a fair trial. During closing arguments, the prosecutor did not improperly mischaracterize the evidence or engage in misconduct that denied defendant a fair trial. Trial court affirmed.

¶ 2 The State charged and convicted defendant, Michael Berry, with attempt first degree murder (720 ILCS 5/8-4(a), 9-1(a)(1) (West 2006)), and unlawful use of a weapon by a felon

(720 ILCS 5/24-1.1(a) (West 2006)). The circuit court of Will County sentenced defendant to 50 years' incarceration for the attempted murder charge and a consecutive 10 years' incarceration for unlawful use of a weapon by a felon. Defendant appeals his conviction for attempt first degree murder and unlawful use of a weapon by a felon, claiming the evidence adduced at trial was insufficient to prove each element of the offenses beyond a reasonable doubt, that the trial court improperly instructed the jury with regard to the elements of attempt first degree murder, and that the prosecutor's improper statements during closing deprived him of his right to a fair trial.

¶ 3 FACTS

¶ 4 Defendant stands convicted of shooting Earlzell Lewis in the face. Witnesses testified at trial to an altercation that led to the shooting of Lewis.

¶ 5 On July 27, 2007, Lewis and Trevale Shorts were walking through the Larkin Village apartment complex in Joliet, approaching the 1005 building, when they encountered a man known as Nitty. Nitty's given name is Frank Banks. Shorts was 17 years old at the time and Lewis was 19 years old. Shorts lived on the second floor of building 1003.

¶ 6 Shorts testified that he knew Nitty and Lewis had problems with each other in the past. Shorts had no specific problem with Nitty, but noted that "when one person into it with someone you hang with, it's like you automatically into it with him, too." Shorts and Nitty got into an argument, which turned physical. Nitty pulled a chain off of Short's pants and hit Shorts with it. Shorts claims to have then protected himself by swinging back, leading Nitty to head toward building 1005. Lewis did not intervene. Shorts noted as Nitty headed toward the 1005 building, defendant and another man came out from the building.

¶ 7 The victim, Lewis, testified that he was 20 years old at the time of the trial. On the day in

question, he and Shorts had just left the pool area of the complex and were walking toward the 1005 building when they came into contact with Nitty. Nitty and Shorts began arguing over money when Nitty took a chain off Shorts's pants and tried to hit Shorts with it. The altercation wound up in front of the 1005 building, resulting in others coming out of the building to watch.

¶ 8 Lewis continued his testimony, noting that defendant was one of the onlookers who came out of the 1005 building to view the altercation. Nitty then told defendant to shoot Shorts. Defendant responded, "I'm not fittin' to shoot this little boy."

¶ 9 Lewis stated that he told Shorts to run off as he believed defendant possessed a weapon given the way defendant's hands were situated on his pants. After Shorts ran off, just Nitty, defendant and Lewis remained on the scene. Nitty then told defendant that they needed somebody younger to shoot Shorts. Lewis thought that statement was directed at him. He smiled and then left the area by walking backwards, never taking his eyes off Nitty and defendant.

¶ 10 Lewis stated that he then entered the 1005 building from the "park side entrance." He went down the stairs to a friend's apartment feeling it was the safest place at the time. The friend's apartment is in the "100 level" of building 1005, known as the basement level. The 200-level of the apartment building is actually ground level. Lewis testified that as he left the apartment:

> "I did not make it out the building. I made it out the building, but as I entered the stairwell, I heard a voice go, 'smoke that nigger.' That's what made me turn around. At that point in time, gunshots were fired and I was hit in the face."

¶ 11 Lewis recognized the voice of the person who made the statement as that of Nitty. As he

turned his head toward the top of the stairs, he saw defendant standing on top of the stairs. Lewis noted, "It was a quick glance. I just turned and I saw then a fire -- the guns went off. The gunfire went off." Defendant stood "slightly behind the door" which was opened in toward the stairwell. Lewis did not see Nitty in the hallway. Lewis acknowledged he was "certain it was this defendant that was standing at the top of the stairs when those shots were fired."

¶ 12 Lewis stated that he exited the building after being shot in the face and headed toward a nearby Auto Zone. He had difficulty speaking but called out for help nonetheless. At Auto Zone, his friend Bianca Ellis met him. She asked him who shot him and he replied, "Nitty."

¶ 13 When asked at trial why he initially told Ellis while at the Auto Zone that Nitty did the shooting, Lewis responded, "Because at the time I knew of [defendant] but I didn't know him and Nitty was the only person that I heard his voice when he ordered the shot. That's -- That was Nitty. Nitty, that's the only name I could pronounce at the time." He had not received any medical attention, found it difficult to speak and was in severe pain at the time from being shot in the jaw. Lewis then confirmed at trial that on the date of the shooting, he saw defendant with the gun in his hand. By the time detectives initially came to discuss the matter with him, he "was not able to talk."

¶ 14 Lewis testified that he was able to indicate to the detectives that two individuals were involved in the incident. Thereafter, the detectives presented him with two photo lineups from which he identified Nitty and defendant.

¶ 15 Jamar Julian testified that he lived in Arkansas with his mother. On July 27, 2007, the day of the shooting, he was present in Joliet, Illinois, as his sister and his brother's girl friend lived in apartment 203 of the 1005 building. Around 10:30 a.m. or 11 a.m. on the day in

question, Julian, Nitty, defendant, Raisa Woods and two children were in apartment 301 of the 1005 building.

¶ 16 Julian continued, noting that at some point, the door buzzer went off prompting defendant to look out the window and proclaim that Nitty was fighting. Thereafter, defendant left the apartment and Julian followed him. Julian did not witness the entire confrontation between Nitty and "some little kid." He did see Nitty with a chain, but had no idea where he acquired it. Julian heard Nitty tell defendant, "let's fight this little kid or jump him or something like that." Defendant then replied that he was not going to fight the little kid as defendant knew the kid's big brother.

¶ 17 Julian noted defendant, Nitty and he went back into 1005 immediately after the little kid ran off and the victim left. Nitty went to 301, and Julian and defendant went to 203. When Julian entered 203, however, defendant was in the hallway outside of apartment 203. Julian closed the door to 203, took five steps toward the bathroom area and then heard gunshots.

¶ 18 Julian stated that his next contact with defendant came five minutes after he heard the gunshots. Defendant knocked on the door in 203. At that time, Julian did not observe any gun in defendant's possession. Julian went up to apartment 301 with defendant so that Julian could retrieve a cell phone he left there earlier in his haste to get to the entrance of the building to observe the scuffle between Nitty and Shorts. He retrieved the cell phone and then went back to 203 with defendant. While in 203 this time, defendant used the bathroom for "about two minutes." Once defendant was done, the two then went back to apartment 301. About 10 minutes after the shots were fired, Julian was in 301 with defendant, Nitty, Raisa and two children when he heard sirens. Julian also noted that some time after the shots were fired,

defendant changed from black or greyish clothing to a red or green shirt. Defendant changed his pants as well.

¶ 19 Julian continued his testimony, noting that the sound of sirens prompted him to look out the window. He noticed police cars responding to the scene. Two or three minutes later, officers knocked on the door at 301. The officers took Julian, the defendant and Nitty to the police station and separated the three of them. He did not speak to any of the others from the apartment on the way to, or while at, the police station. Julian gave a recorded statement to the police and then was taken back to the apartment complex.

¶ 20 On cross-examination, Julian acknowledged that the police asked him about a gun, and he initially insisted he had no knowledge of a gun. Julian stated that the police informed him that they believed he hid the gun for defendant. Then, during his recorded statement, which took place approximately seven hours after he arrived at the police station, he indicated that he did, in fact, see a gun after the shots were fired.

¶ 21 Julian noted that everything he told the police during his recorded statement was true except for the part about seeing a gun on the day of the shooting. Julian stated that he "made up" the portion of his recorded statement to the police in which he informed officers that the defendant came to the apartment he was in after the shooting and told him "to get rid of the gun." Julian admitted that he described the gun to the officers as "a revolver with a spinning chamber." The description of the revolver, instead of a semi-automatic handgun, came into his head from watching television.

¶ 22 Finally, Julian testified at trial he told the officers in his recorded statement that defendant told him, right before the police knocked on the apartment door, to make sure no one says

anything. At trial, he claimed he "just made that little part up."

¶ 23 Detective Tim Powers conducted the photo arrays. Powers testified that prior to putting the photo arrays together, Lewis indicated to him that two people were involved in the shooting. Lewis told Powers that Nitty said "shoot" or "smoke that nigger." Powers then put together two photo arrays. At approximately 5:30 p.m., while still in the hospital, Lewis picked Nitty's picture out of the array as the person who made that statement. Lewis then identified defendant as the person who shot him. Lewis told Powers that Nitty had ripped off Lewis and Shorts in the past, but they were on good terms before the shooting.

¶ 24 Bianca Ellis testified that she was in her first floor apartment in building 1005 when she heard a gunshot. She knew Lewis and considered him her "god-brother." After the gunshot, her roommate saw Lewis running and screaming for help. She then chased after him on foot. She caught up to him and asked, "who did it. He said -- He said, dude from upstairs." After that response, Ellis "asked him if Nitty did it." She stated that Lewis "shook his head yes" in response to her question.

¶ 25 Officer Fernando Urquidi testified that he spoke with Shorts and Ellis at Auto Zone. Shorts told Urquidi that Nitty was the shooter, and Urquidi communicated that information to other officers over the radio. Ellis told Urquidi that she heard gunshots, then saw Nitty outside the 1005 building. Urquidi then took Ellis to speak to detectives on the scene.

¶ 26 Detective David Jackson testified that he did not have a clear memory of what Ellis told him at the scene, but his report indicated she told him that she saw Nitty with a handgun running away from the location of the shooting.

¶ 27 Detective Phillip Valera testified that he transported Julian to the Joliet police department

on the day of the incident. Julian was placed in an interview room. Julian informed the officer that his parents' phone in Missouri had been disconnected as was the phone of the relative in Illinois with whom he was staying. Ultimately, Valera reached an officer in Arkansas, who made contact with Julian's parents and Valera was able to speak to a woman claiming to be Julian's mother. He then questioned Julian about the shooting incident and Julian denied having any knowledge about the incident.

¶ 28 Valera stated that he asked Julian if Julian wanted to be considered a witness or a suspect in the case. Thereafter, Julian cooperated with investigators. Julian never indicated to Valera that he simply wanted to go home and leave the interview room. Before Julian told officers about the gun, "he was told that someone had indicated that he had hidden a gun." As to what exactly the officers told Julian concerning the gun, Valera specifically stated:

> "We showed him that we had gotten a consent to search the apartment that he was staying at that he never told us about, and we were trying to get him to tell us if he knew where the gun was at. That's what we were trying to find out."

¶ 29 Raisa Woods testified that she is the younger sister of Kiesha and that defendant is Kiesha's boyfriend. At the time of the shooting, Nitty was Raisa's boyfriend. Raisa admitted that she was in love with Nitty, both on the day of the shooting and at trial. She knew Nitty was charged with the attempted murder of Lewis and did not want to see him get into trouble. Raisa claimed that defendant often carried a gun, which she saw on the day of the shooting.

¶ 30 Raisa continued her testimony by noting that she was in Kiesha's third floor apartment babysitting Kiesha's two children when the shooting occurred. Nitty, defendant and Julian were

also in the apartment prior to the shooting. Nitty went outside to check on his car. A short time later, defendant and Julian went downstairs to break up a fight between Nitty and Shorts. About 15 to 20 minutes later, Raisa heard three gunshots. At trial, Raisa claimed Nitty was in the apartment when the shots were fired, but defendant and Julian were not. Defendant and Julian returned to the apartment about six minutes after the shots were fired. Defendant washed his hands, changed his clothes and put a black revolver down on a table. Before the shooting, defendant and Nitty were wearing the same color clothes: a black shirt, black shoes and jeans. About 10 minutes after defendant changed clothes, the police knocked on the door. Defendant told everyone to act cool and play cards.

¶ 31 Raisa claimed at trial that she did not speak to the police until one of them threatened to throw her in jail. She then told the officer that she heard three shots, but did not say that Nitty was in the apartment with her at the time the shots were fired. She did not tell the officers about defendant's statement to "act cool" or about defendant changing his clothes until about a month prior to trial. This was so, she initially claimed while testifying, as she was intimidated by defendant. When it was pointed out that defendant, Nitty and Julian were taken to the police station before she talked to officers at the apartment, she stated she did not withhold the information out of intimidation but, rather, because she "really didn't feel like talking" at the time.

¶ 32 Detective Linda Odom testified that she spoke with Raisa in the third floor apartment on the day of the shooting. Raisa told Detective Odom that she, defendant and Nitty heard a commotion outside the building then saw Lewis fighting with Shorts. Defendant and Nitty went outside to break up the fight. Raisa was hesitant to talk to the detective, but not scared. Odom

did not ask any questions about the shooting itself. Raisa never stated defendant had a gun nor did she indicate Nitty was in the apartment at the time of the shooting.

¶ 33 Sergeant Lindsey Heavener testified that when he arrived at the third floor apartment, Raisa told him that there were only two men inside. He immediately observed defendant and Julian in the apartment and was surprised to discover Nitty inside the bathroom some time later.

¶ 34 Investigator Nicholas Amelio testified that he was the evidence technician assigned to the shooting. He did not recover any bullets or shell casings from the area. He recovered "fragmentation from a projectile" from the outside door stoop that was consistent with a single copper jacketed lead bullet fired from inside building number 1005. He could not determine precisely where the shot originated. No firearms were recovered from either the third floor apartment or second floor apartment. No marijuana or narcotics were recovered from either the third floor or second floor apartment.

¶ 35 Detective Michael Batis testified that he was the lead detective in the case. He took a video statement from Julian about 11:30 p.m., and then took a video statement from defendant after midnight. Batis noted that Julian, defendant and "other people" were being held for investigative reasons after the shooting and noted an attempted murder investigation is "usually a lengthy process in terms of going through the evidence, talking and collaborating with other officers, learning the information they have, and trying to come together with a plan in terms of talking to people." No gun, narcotics or marijuana were discovered during searches of the second and third floor apartments of the 1005 building.

¶ 36 Detective Batis continued his testimony stating that in defendant's statement, defendant indicated he never had a gun and no one would tell the police otherwise. Batis authenticated a

recording of defendant's interview that the trial court played for the jury.

¶ 37 In the interview, defendant is seen telling police officers that after hearing the shots, he walked to 901 Lois Place to buy weed from a man named "Bud." The walk took three to four minutes and is approximately one-half mile. Upon arriving at 901 Lois Place, defendant waited two minutes for Bud, then called him, but Bud did not answer the phone call. Defendant was about to walk off when Bud came out of the building. The two engaged in small talk, then completed the transaction for marijuana, which took approximately six minutes. Defendant did, in fact, buy weed from Bud, then walked back to the 1005 building. Defendant acknowledged in his statement that from the time he heard the shots and left 1005, until he returned to the building after his weed purchase, 12 to 16 minutes had transpired.

¶ 38 Defendant's interview continued with the detectives informing defendant that officers were on the scene within two minutes of the shots being fired and they personally were on the scene within four minutes of the shooting. They further told defendant that upon their arrival, building 1005 had been secured and no one was allowed in or out. They asked defendant how he could have entered the building 12 to 16 minutes after the shooting when it was secured. Defendant responded that when he returned from buying his weed, the building was not secured and only two to three squad cars were on the scene. The officers asked defendant for both his cell phone number and Bud's cell phone number so they could confirm his story of calling Bud while at 901 Lois. Defendant did not know his cell phone number or Bud's and had no description of Bud beyond being tall and dark.

¶ 39 Dr. Joseph Sciana testified that he is an otolaryngologist. Dr. Sciana characterized Lewis's injuries as "a high velocity, penetrating type injury with a mandible fracture, possible

airway compromise, and bleeding difficulties." Dr. Sciana further stated that the high velocity nature of the injury caused Lewis's jaw to shatter "in many pieces, kind of like an egg shell would break." During surgery, he made an incision about two centimeters just underneath the jaw, lifted up a muscle then "basically peeled everything off his jaw to reconstruct his jaw" and "then attempted to find a branch of that nerve to ensure that it was intact." Dr. Sciana "used a mesh plate" which looks like a net or a grid then "put multiple screws into multiple different pieces to hold" the jaw fragments together. The mesh and screws which Dr. Sciana inserted into Mr. Lewis's jaw are "permanently inside of Mr. Lewis's face."

¶ 40 Dr. Sciana was asked, "After the surgery, will Mr. Lewis have any permanent scarring?" He replied, "Yes." Defense counsel began his cross-examination asking, "You indicated there would be permanent scarring, is that correct?" Dr. Joseph answered, "Yes, sir." Defense counsel also elicited testimony from Dr. Joseph, indicating Mr. Lewis's jaw will never be back to normal "because there are screws and plates in there, it will never be in its preoperative condition."

¶ 41 The State and defendant entered into an "agreed stipulation as to evidence." Prior to closing its case-in-chief and pursuant to the stipulation, the prosecutor informed the jury that the "parties agree and stipulate that defendant, Michael L. Berry, has been previously convicted of the felony offense of unlawful distribution of a controlled substance. You may consider the convicted-felon status element of the crime of unlawful use of weapon by felon as proved by this stipulation."

¶ 42 Shortly thereafter, the State rested. Defendant put on no testimony. Ultimately, the jury returned guilty verdicts against defendant for attempt first degree murder and unlawful use of a weapon by a felon. Defendant filed a posttrial motion seeking a new trial, which the trial court

denied. The trial court sentenced defendant to 600 months' incarceration for the attempted murder charge and 120 months' incarceration for the unlawful use of a weapon charge. Defendant filed a motion attacking this sentence, which the trial court also denied. This appeal followed.

¶ 43 ANALYSIS

¶ 44 Defendant raises three issues on appeal. Initially, defendant attacks the sufficiency of the State's evidence. Next, defendant argues the trial court improperly instructed the jury regarding the required elements of the offense of attempt first degree murder. Finally, defendant claims improper statements made by the prosecutor during closing arguments deprived him of a fair trial.

¶ 45 I. Sufficiency of the Evidence

¶ 46 Defendant contends that the evidence adduced by the State at trial was insufficient to convict him of attempt first degree murder with a firearm. When considering a challenge to the sufficiency of the evidence, we must determine whether any rational trier of fact could have found the essential elements of the crime proved beyond a reasonable doubt after viewing the evidence in the light most favorable to the prosecution. *People v. Collins*, 106 Ill. 2d 237 (1985). To prove attempt first degree murder with the firearm add-on, the State had the burden of proving that defendant, with the intent to kill Earlzell Lewis, performed an act, which constituted a substantial step toward the killing of Lewis, and that defendant personally discharged a firearm that proximately caused great bodily harm or permanent disfigurement to Lewis. 720 ILCS 5/8-4(a), (c)(1)(D), 9-1(a)(1) (West 2006). Defendant does not dispute that the State sufficiently proved an act constituting a substantial step toward the killing of Lewis was taken, that a firearm

was personally discharged, or that great bodily harm or permanent disfigurement was caused to Lewis by the discharge of the firearm. Defendant simply claims that the State failed to adduce sufficient evidence proving, beyond a reasonable doubt, that he was the person who discharged the firearm.

¶ 47 Defendant asserts that "only one person actually witnessed the shooting" and claims that person, the victim, identified "a person he did not know (Berry) on a two-second glimpse in a poorly lit internal stairway." Defendant continues that this "dubious" identification was insufficient to prove he shot Lewis, especially when coupled with: (1) the victim's previous statement that Nitty was the shooter; (2) other witness testimony that Nitty was seen leaving the scene with a gun; (3) lack of an inculpatory statement from defendant; (4) substantially inconsistent testimony from other witnesses; and (5) defendant's lack of motive.

¶ 48 Not only does defendant mischaracterize the evidence by suggesting that the *only* evidence of his involvement in this shooting stemmed from Lewis's identification, but he totally ignores our standard of review. Again, we must view the evidence in the light most favorable to the prosecution, allowing all reasonable inferences from the evidence to be drawn in favor of the State. *People v. Cunningham*, 212 Ill. 2d 274, 280 (2004). The State adduced evidence at trial indicating defendant asked Julian to help hide the gun, a revolver. Raisa Woods saw defendant place a black revolver on the table after the shooting. The State further put forth evidence that defendant felt it necessary to change his clothes and wash his hands following the shooting, but prior to the arrival of the police.

¶ 49 Defendant told the police he left the scene of the attempted murder to purchase marijuana, returned 12 to 16 minutes later, walked passed at least three squad cars and entered the scene of

an attempted murder while in possession of an illegal substance. No marijuana was found on defendant or in the apartment in which he was located. Evidence indicated that the police were on the scene within two minutes of shots being fired and had building 1005 secured well before defendant allegedly returned from his pot purchase.

¶ 50 It is not the function of this court to retry the defendant (*People v. Tenney*, 205 Ill. 2d 411, 428 (2002)), as it falls upon the trier of fact to judge the credibility of witnesses, resolve conflicts of the evidence, and draw conclusions based on the evidence. *People v. Bomar*, 405 Ill. App. 3d 139, 146 (2010). Defendant's claim to this court that the "jury's verdict that [he] was the shooter rested entirely on the identification testimony of" Lewis simply cannot be sustained. While Julian recanted the statement about the gun originally made to the police and Raisa admitted she was in love with Nitty, it is not for us to determine whether their testimony was credible or unbelievable. We simply must view all the evidence, and reasonable inferences drawn therefrom, in the light most favorable to the State.

¶ 51 However, even if we were to find the evidence described above so totally inconsistent or inherently improbable as to be contrary to man's common experience and reject it (*People v. Ortiz*, 196 Ill. 2d 236, 267 (2001)), which we do not, we still must acknowledge that the testimony of a single eyewitness may be sufficient to convict if it is reliable. *People v. Slim*, 127 Ill. 2d 302 (1989); *People v. Matthews*, 299 Ill. App. 3d 914 (1998). Five factors are relevant in evaluating the reliability of identification testimony: (1) the witness's opportunity to view the offender; (2) the witness's degree of attention; (3) the accuracy of the witness's prior descriptions; (4) the witness's level of certainty; and (5) the length of time between the crime and confrontation. *Neil v. Biggers*, 409 U.S. 188 (1972).

¶ 52 Regarding the first *Biggers* factor, the opportunity to view the offender, defendant argues that this weighs in his favor as Lewis stated he only saw the shooter for a second or two, the shooter was standing slightly behind a door, and the stairwell was not well lit. Defendant argues that Investigator Amelio testified that the hallway "was so dark that Amelio and another officer had to hold the door open to let light into the stairway, even though the picture was taken with a flash camera." However, Amelio never testified that the purpose of opening the door was to let light into the hallway. Amelio indicated the door was held open by another officer in a photograph to achieve allowing the "shade" or the front part of the camera lens to be "completely even with the front of the door in its open position." Amelio specifically rejected, on cross-examination, defense counsel's suggestion that opening the door was necessary to allow sufficient light to enter the hallway so that a photograph could be taken. Amelio actually testified that there were overhead lights in the stairwell strong enough to interfere with one of the photographs taken of the inside of the door frame.

¶ 53 The first *Biggers* factor unquestionably favors the victim's identification of defendant. Lewis knew Nitty and had an opportunity to observe both Nitty and defendant during the altercation with Shorts. It is reasonable to infer that he would have been able to tell the difference between the two at a glance. While he did state defendant was behind a door, his specific words were that defendant was only "slightly" behind the door when the shooting occurred and that nothing covered defendant's face. Moreover, defendant was, at best, a dozen feet away from Lewis when the shooting occurred.

¶ 54 Defendant claims the second *Biggers* factor, the witness's degree of attention, also favors his position that the identification is faulty. He basis this claim on Lewis's testimony that he only

quickly glanced, for approximately two seconds, up the stairs before being shot. Defendant cites no authority holding that the a witness's degree of attention is directly proportional to the amount of time he views or focuses on an assailant. Also important is that Lewis had just seen defendant with Nitty during the altercation with Shorts.

¶ 55 The third factor, accuracy of the witness's prior descriptions, weighs against Lewis's identification of defendant as the shooter. When asked by Bianca Ellis who shot him, Lewis responded the "dude from upstairs." When she asked if he meant Nitty, Lewis nodded his head in affirmation. Lewis explained that he answered Ellis's questions, "Because at the time I knew of [defendant] but I didn't know him and Nitty was the only person that I heard his voice when he ordered the shot. That's – That was Nitty. Nitty, that's the only name I could pronounce at the time." While the record contains an explanation for why Lewis originally identified Nitty as the shooter, there is no doubt this factor weighs against Lewis's identification of defendant as the shooter.

¶ 56 The fourth factor, the witness's level of certainty, weighs heavily in favor of the reliability of Lewis's identification of defendant as the shooter. At trial, Lewis indicated he was "certain" that defendant shot him.

¶ 57 The fifth factor, length of time between the crime and confrontation, also weighs in favor of Lewis's identification. Within three to four hours of the shooting, Lewis identified defendant to officers as the shooter.

¶ 58 When weighing the *Biggers* factors, we find Lewis's identification of defendant as the shooter is sufficiently reliable to support defendant's conviction for attempt first degree murder. Moreover, we find that the State adduced sufficient testimony at trial to support each and every

element of the offense of unlawful use of a weapon by a felon. The parties stipulated that at the time of the shooting, defendant stood convicted of unlawful distribution of a controlled substance: a Class 2 felony. The stipulation, read to the jury during the State's case-in-chief, acknowledged defendant's conviction. For the reasons stated above, we find sufficient evidence was adduced at trial, which indicated defendant did, in fact, possess and discharge a firearm.

¶ 59 II. Jury Instructions

¶ 60 Defendant argues that the trial court improperly instructed the jury which, in turn, misled or confused the jury, thereby depriving him of his constitutional right to a fair trial. Specifically, defendant argues that inconsistent jury instructions allowed the jury to find him guilty of attempt first degree murder without finding he personally discharged the firearm, which proximately caused Earlzell Lewis's injuries. As such, defendant argues that the State failed to prove an element of the offense charged beyond a reasonable doubt in violation of *Apprendi v. New Jersey*, 530 U.S. 466 (2000): that being the add-on element that defendant personally discharged a firearm, which proximately caused great bodily harm or permanent disfigurement to Earlzell Lewis.

¶ 61 The function of jury instructions is to convey the law to the jury that applies to the evidence presented. *People v. Fuller*, 205 Ill. 2d 308, 343 (2002). Jury instructions should not be misleading or confusing. *People v. Bush*, 157 Ill. 2d 248, 254 (1993). Their correctness does not depend on whether defense counsel can imagine a problematic meaning, but whether ordinary persons acting as jurors would fail to understand them. *People v. Herron*, 215 Ill. 2d 167, 188 (2005).

¶ 62 Generally, we will reverse a trial court's determination about what instruction to give only

if the trial court abused its discretion. *People v. Rodriguez*, 387 Ill. App. 3d 812, 821 (2008). An abuse of discretion occurs only where the trial court's ruling is arbitrary, fanciful or unreasonable, or where no reasonable person could take the view adopted by the trial court. *Id.* Muddying the waters of our review is the fact that not only did defense counsel fail to object to the instructions given, but he affirmatively agreed to them without offering any alternative instructions. Defendant acknowledges this fact yet asks us to review the matter under plain error or, in the alternative, grant him relief based upon ineffective assistance of counsel.

¶ 63 A defendant forfeits review of any alleged jury instruction error if he does not object to the instruction or offer an alternative and does not raise the issue in a posttrial motion. *People v. Herron*, 215 Ill. 2d at 175. However, Illinois Supreme Court Rule 451(c) (eff. July 1, 2006) fashions a limited exception to the general rule to correct " 'grave errors' and errors in cases 'so factually close that fundamental fairness requires that the jury be properly instructed.' " *Herron*, 215 Ill. 2d at 175. Rule 451(c) is coextensive with the plain-error clause of Supreme Court Rule 615(a), which states that any "error, defect, irregularity, or variance which does not affect substantial rights shall be disregarded. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Ill. S. Ct. R. 615(c) (eff. Jan. 1, 1967).

¶ 64 The tenets of plain-error analysis should be familiar. The plain-error doctrine allows a reviewing court to consider a forfeited claim when "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the

integrity of the judicial process, regardless of the closeness of the evidence." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). "In both instances, the burden of persuasion remains with the defendant." *Herron*, 215 Ill. 2d at 187. As noted by our supreme court in *People v. Thurow*, 203 Ill. 2d 352 (2003):

> "Though plain-error analysis normally requires the same kind of inquiry as does harmless-error review, there is an 'important difference' between the two. [Citation.] In a harmless-error analysis, which applies where, as in the case at bar, the defendant has made a timely objection, it is the State that 'bears the burden of persuasion with respect to prejudice.' [Citation.] In other words, the State must prove beyond a reasonable doubt that the jury verdict would have been the same absent the error. [Citations.] The situation is different under a plain-error analysis, which applies where the defendant has failed to make a timely objection. There, '[i]t is the defendant rather than the [State] who bears the burden of persuasion with respect to prejudice.' [Citation.]" *Id.* at 363.

¶ 65 The current of "fairness" running through both prongs of the plain-error analysis led our supreme court to note, in People v. Casillas, 195 Ill. 2d 461 (2000), that its task was to "endeavor to determine whether defendant was denied a fair trial by the court's failure" to give a specific instruction. Casillas, 195 Ill. 2d at 473. The Casillas defendant also failed to properly preserve his objections to the instructions for review. Id. Rather than engaging in a strict application of plain-error analysis, the *Casillas* court noted that in *People v. Layhew,* 139 Ill. 2d 476, 486

(1990) it "adopted the totality of the circumstances analysis ***." *Casillas*, 195 Ill. 2d at 474. "Under this test, to determine whether defendant received a fair trial, we must look to all the circumstances including all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming and any other relevant factors." *Id* at 474.

¶ 66. In *People v. Hopp*, 209 Ill. 2d 1 (2004), our supreme court reviewed the rules of waiver and forfeiture in cases where defendant fails to tender a jury instruction, only to complain about the failure on review. The *Hopp* court stated:

> "Supreme Court Rule 366 provides that a party that fails to tender a jury instruction may not raise the failure to give the instruction on appeal. [Citation.] However, Rule 451(c) provides that 'substantial defects [in jury instructions in criminal cases] are not waived by failure to make timely objections thereto if the interests of justice require.' [Citation.]
>
> Rule 451(c)'s exception to the waiver rule for substantial defects applies when there is a grave error or when the case is so factually close that fundamental fairness requires that the jury be properly instructed. [Citations.] The tests for application of Rule 451(c)'s exception to the waiver rule are 'strict tests' that 'demonstrate that the exception to the waiver rule is limited and is applicable only to serious errors which severely threaten the fundamental fairness of the defendant's trial.' [Citation.] The function of jury instructions is to convey to the jurors the law that

> applies to the facts so they can reach a correct conclusion. [Citation.] Thus, the erroneous omission of a jury instruction rises to the level of plain error only when the omission creates a serious risk that the jurors incorrectly convicted the defendant because they did not understand the applicable law, so as to severely threaten the fairness of the trial." *Id.* at 7-8.

Accordingly, any alleged jury instruction error in this case is forfeited unless defendant can show such error threatened the fundamental fairness of his trial. *Id.* While our ultimate task will be to determine whether the instructions denied defendant a fair trial, our first step "is to determine whether error occurred in the giving of the instruction." *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007).

¶ 67 Turning toward that task, we note that the trial court gave the standard definitional instruction for attempt first degree murder (Illinois Pattern Jury Instructions, Criminal, No. 6.05X (4th ed. 2000) (hereinafter, IPI Criminal 4th No. 6.05X)), which states:

> "A person commits the offense of attempt first degree murder when he, with the intent to kill an individual, does any act which constitutes a substantial step toward the killing of an individual.
>
> The killing attempted need not have been accomplished. "

¶ 68 The court also gave a modified IPI, Criminal, No. 6.07X (4th ed. 2000) (hereinafter IPI Criminal 4th No. 6.07X) as the issues instruction, which included the additional element for the firearm add-on, and read:

"To sustain the charge of attempt first degree murder, the State must prove the following propositions:

First Proposition: That the defendant performed an act which constituted a substantial step toward the killing of an individual; and

Second Proposition: That the defendant did so with the intent to kill an individual; and

Third Proposition: That the defendant personally discharged a firearm that proximately caused great bodily harm or permanent disfigurement to Earlzell Lewis." (Emphasis in the original.) IPI Criminal 4th No. 6.07X.

¶ 69 Defendant argues the general definitional instruction conflicts with issues instruction in that the definition instruction does not identify the firearm add-on. That is, it contains no language indicating the attempt first degree murder in this case included the personal discharge of a firearm that proximately caused great bodily harm or permanent disfigurement. This, coupled with the fact that "only general verdict forms for attempt first degree murder and not a second set of verdict forms for the add-on element" were presented to the jury leads defendant to conclude that "the jury did not make a clear finding that the State proved the add-on element beyond a reasonable doubt, and this court should remand for a new trial with correct instructions."

¶ 70 Section 5/8-4(c)(1)(D) of the Criminal Code of 1961 (the Code) provides the statutory basis for adding 25 years to defendant's sentence for "personally discharg[ing] a firearm that

proximately caused great bodily harm" or "permanent disfigurement" to the victim. 720 ILCS 5/8-4(c)(1)(D) (West 2006). Our research revealed 20 reported Illinois decisions that discuss section 8-4(c) of the Code. None of these decisions analyze whether or not error is committed when the general definition instruction given to the jury fails to include the statutory add-on language. Nevertheless, we do not quarrel with defendant's assertion that failing to include the add-on language in the definitional instruction of attempt first degree murder was error. *Apprendi* makes clear that, except for the fact of a prior conviction, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000). Certainly, as an element of the offense charged, the add-on language should have been included in the definition instruction.

¶ 71 However, determining an instruction was incomplete does not end our inquiry. *Piatkowski*, 225 Ill. 2d at 566. "Defendant must meet his burden to show that the error was prejudicial ***." *Id.* This he did not and cannot do. Not every *Apprendi* violation requires a do-over. *People v. Kaczmarek*, 207 Ill. 2d 288 (2003); *People v. Thurow*, 203 Ill. 2d 352, 371-72 (2003); *People v. Nitz*, 219 Ill. 2d 400 (2006); *People v. Rivera*, 227 Ill. 2d 1 (2007).

¶ 72 The trial error, again, is failure to include the add-on language in the definitional instruction. To believe that error somehow tipped the scales of justice against defendant, one would have to conclude that the jury convicted him without finding he personally fired the gun that caused Earlzell Lewis's injuries. The record belies any such speculation.

¶ 73 Defendant acknowledges that the jury could not have convicted him without finding he personally fired the gun that caused the requisite harm. On page 24 of his opening brief,

defendant notes that "*the* jury was instructed that they could find Berry guilty *only if they found the add-on element that he personally discharged a firearm that proximately caused great bodily harm or permanent disfigurement to Lewis*. *** As a matter of strategy, the State exercised its discretion not to charge Berry with or to tender a jury instruction for lesser offenses, such as attempt murder without the enhancement." (Emphasis added.) Moreover, both parties emphasized at trial that to find defendant guilty of attempt first degree murder, the jury must find defendant was the person who shot Lewis. The State explained at the beginning of its closing argument that it was its burden to prove that defendant pulled the trigger, then it restated that element after summarizing the testimony of the victim. At the end of its closing argument, the State again repeated that it needed to prove defendant personally discharged the firearm as an element of its case. Defendant's entire case at trial centered on the fact that the State failed to prove he fired the handgun that proximately caused Lewis's injuries. In rebuttal, the prosecutor stated, "You're here to decide whether [defendant] pulled the trigger."

¶ 74 It is beyond question that the jury was sufficiently informed of the State's burden of proving that defendant personally discharged the firearm that proximately caused Lewis's injuries. Defendant failed to satisfy his burden under the plain-error doctrine, that the instructional error resulted in the jury somehow convicting him of attempt first degree murder without concluding that he fired the gun. Under plain-error analysis, defendant has the burden of proving prejudice. The only real contested issue at trial was whether defendant personally discharged the handgun. The jury could not have convicted defendant of attempted murder in this case without finding that he was the shooter. Therefore, there is no plain error.

¶ 75 The court in *People v. Rios*, 318 Ill. App. 3d 354 (2000), addressed a similar situation

where the definitional instruction failed to mirror the issues instruction. In *Rios*, defendant claimed he shot and killed the victim in self-defense. After making this claim, it was incumbent upon the State to prove, as an element of the offense, that the killing of the victim was without lawful justification. *Id.*; *People v. Young*, 347 Ill. App. 3d 909, 920 (2004); *People v. Jeffries*, 164 Ill. 2d 104, 127 (1995). In the general definitional instruction, the trial court did not include the phrase "without legal justification." *Rios*, 318 Ill. App. 3d at 360. However, the issues instruction noted that the State must prove, "That the defendant was not justified in using the force which he used." *Id.*

¶ 76 The *Rios* court noted that our supreme court, in *Casillas*, "looked to the 'totality of the circumstances,' including 'all the instructions to the jury, the arguments of counsel, whether the weight of the evidence was overwhelming and any other relevant factors' to determine whether the failure to give the instructions denied the defendant a fair trial." *Rios*, 318 Ill. App. 3d at 363 (quoting *Casillas*, 195 Ill. 2d at 468). The *Rios* court found, after viewing the totality of the circumstances, that defendant was not deprived of a fair trial by the trial court's failure to include the phrase "without lawful justification" in the general definitional instruction. *Rios*, 318 Ill. App. 3d at 364. This was so as the language was included in the issues instruction, as well as the fact that both parties significantly discussed the justification issue during closing arguments. *Id.*

¶ 77 Similarly, both parties in the case at bar significantly discussed whether, in fact, the State met its burden of proving defendant fired the gun which caused Earlzell Lewis's injuries. *Rios* supports our holding that no plain error occurred here.

¶ 78 Defendant cites three cases, *Ayers*, *Battle* and *Smith*, to support the proposition that the trial court improperly instructed the jury. *People v. Ayers*, 331 Ill. App. 3d 742 (2002), is similar

in some regards to *Rios*. The State accused the *Ayers* defendant of murder and he claimed self-defense, which the court termed a "mitigating factor." *Id*. at 750. Like *Rios*, the trial court in *Ayers* failed to include the phrase "without lawful justification" in its definitional instruction, but did include that language in an issue instruction. *Id*. The trial court in *Ayers*, however, also gave the jury a second, first degree murder issue instruction, which only applied "when second degree murder is not also an issue." *Id* at 747. This, the *Ayers* court held, forced the jury to "choose between two contradictory instructions which related to a central issue in the case, self-defense. Based on these instructions, the jury could have improperly ended its deliberations without considering [defendant's] self-defense argument and convicted [him] on the basis of the incorrect instruction." *Id.* at 750. There is no similar fear in the case at bar.

¶ 79 Unlike *Ayers*, the trial court in this case, as in *Rios*, gave the jury but one issues instruction. While the added issues instruction in *Ayers*, coupled with the failure to include "without legal justification" language in the definitional instruction may have resulted in that jury convicting defendant without properly considering his theory of self-defense, it is simply not possible that this jury convicted defendant of attempt first degree murder without concluding that he was the one who personally discharged the firearm that proximately caused great bodily harm or permanent disfigurement. Again, defendant does not contest the fact that Lewis suffered great bodily harm or permanent disfigurement and acknowledges that those injuries were caused by the discharge of a firearm. The entire trial centered around whether defendant did, in fact, discharge that firearm. "[T]he purpose of jury instructions is to provide the jury with correct legal principles that apply to the evidence, thus enabling the jury to reach a proper conclusion based on the applicable law and the evidence presented." *People v. Parker*, 223 Ill. 2d 494, 500 (2006).

This jury was well aware of the correct legal principles to apply to the evidence.

¶ 80 Defendant also cites to *People v. Battle,* 378 Ill. App. 3d 817 (2008), to support his contention that the instructions given in this case denied him a fair trial. Our supreme court vacated *Battle* (see 232 Ill. 2d 583) directing the *Battle* court to reconsider its decision in light of *People v. Smith*, 233 Ill. 2d 1 (2009). As defendant has cited to an opinion vacated by our supreme court, we will not address arguments based on *Battle*. *Smith*, however, determined that when a defendant is charged with first degree murder based upon differing mental states, intentional or knowing murder and felony murder, the defendant is entitled to special and separate verdict forms based upon each separate mental state. Ultimately, the supreme court held:

> "We agree with defendants and now hold that where, as here, specific findings by the jury with regard to the offenses charged could result in different sentencing consequences, favorable to the defendant, specific verdict forms must be provided upon request and the failure to provide them is an abuse of discretion. Accordingly, we affirm the appellate court's finding that, in the cases at bar, the trial courts erred when they refused defendants' requests for separate verdict forms." *Smith*, 233 Ill. 2d at 23.

¶ 81 Nothing in *Smith* mandates reversal in this matter. where defendant was charged with a single count of attempt first degree murder. Defendant never requested a separate verdict form for the add-on element, and there is no chance the jury convicted defendant without finding he

personally discharged the firearm. Again, this is not a case in which defendant's tendered instructions were rejected by the trial court. In this case, defendant agreed to the instructions given, but now complains the instructions were deficient.

¶ 82 Finally, defendant argues that his counsel was constitutionally ineffective for failing to object to the jury instructions or tender a definitional instruction which included the add-on language. To establish a colorable ineffective assistance of counsel claim, a defendant must show that counsel's performance was deficient in that it fell below an objective standard of reasonableness and that the deficient performance prejudiced defendant such that, absent the deficiency, there is a reasonable probability that the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). If an appellate court "can dispose of defendant's ineffective assistance claim because he suffered no prejudice, [it] need not address whether his counsel's performance was objectively reasonable." *People v. Logan*, 2011 IL App (1st) 093582, ¶ 33. As noted above, the failure to include the add-on language in the definitional instruction did not prejudice this defendant. The absent add-on language would have focused on defendant's act of personally discharging the firearm that caused the victim's injuries. This entire trial focused on whether or not defendant personally discharged the firearm. The jury was well aware of the fact that they could not find defendant guilty of this offense unless they found he personally discharged the firearm. As trial counsel's failure to object to the instructions given to the jury did not prejudice defendant, we find no merit in his assertion that his trial counsel was constitutionally ineffective.

¶ 83 III. Prosecutor's Remarks During Closing Arguments

¶ 84 Defendant's final contention is that specific statements made by the prosecutor in closing

arguments "deprived him of a fair trial and due process." Defendant breaks the statements down into two categories: those improperly "designed solely to arouse the passions of the jury" and those which mischaracterize the evidence. Defendant claims the making of the statements equate to prosecutorial misconduct. Defendant acknowledges he "failed to object to most of the improper arguments" but nonetheless seeks review under the plain-error doctrine or, in the alternative, relief for being provided constitutionally ineffective counsel.

¶ 85 The State responds, claiming that all of the prosecutor's comments were proper and defendant has failed to show any substantially prejudiced defendant. As such, the State asserts defendant has neither shown plain error, prosecutorial misconduct, nor ineffective assistance of counsel.

¶ 86 A. Mischaracterization of Evidence

¶ 87 Defendant argues the State mischaracterized the evidence by: (1) claiming there were no obstructions in the hallway and it was well lit; (2) claiming Julian walked into the second floor apartment while defendant "stays out there where the gunshots were fired;" (3) blaming Raisa's delay in reporting her version of the events out of fear that defendant and Nitty were “in the next room,” when they were not; and (4) claiming that Julian lived in the same building, 1005, for a couple of weeks during the summer of 2007.

¶ 88 A prosecutor is given great leeway during closing argument. *People v. Simms*, 168 Ill. 2d 176 (1995). When reviewing whether comments made during closing argument are proper, the closing argument must be viewed in its entirety and remarks must be taken in context. *People v. Kitchen*, 159 Ill. 2d 1 (1994). The prosecutor may comment on the strength of the evidence and argue all fair and reasonable inferences therefrom. *People v. Jackson*, 399 Ill. App. 3d 314

(2010).

¶ 89 The State argues that the final four statements listed above were not mischaracterizations of the evidence but, instead, reasonable inferences drawn therefrom. We agree.

¶ 90 When showing the jury a photograph of the stairwell, the prosecutor made two remarks with which defendant takes exception: "As you can see, there's no obstructions. There's nothing in the way. It's well-lit."

¶ 91 Investigator Amelio testified that overhead lights were located in the stairwell and they were powerful enough to interfere with his photography. A reasonable inference drawn from that testimony is that the hallway was well-lit. Moreover, the fact that Lewis testified that defendant was slightly behind a door when the shooting occurred does not render the prosecutor's statement regarding the lack of obstruction improper. The context of the entire statement indicates the prosecutor did not try to hide Lewis's testimony concerning defendant being positioned slightly behind a door. He merely indicated to the jury that no obstructions existed between the area in which defendant stood to do the shooting and where Lewis stood when shot.

¶ 92 While using a photograph of the scene of the shooting, the prosecutor stated: "That's the stairwell right there. That's where the defendant was standing. Down here, which is probably not on the screen, at the bottom of the landing is where Mr. Lewis was standing. As you can see, there's no obstructions. There's nothing in the way. It's well-lit."

¶ 93 Defendant also contends that the prosecutor's remark concerning Julian's testimony misrepresented the evidence. Specifically, the prosecutor stated that Julian indicated the defendant "stays out there where the gunshots were fired" and that he "lived in the same building, 1005, in the summer of 2007 for a couple of weeks." Julian clearly testified to a friendship with

defendant and to the fact that he lived in the 1005 building, off and on, during the summer of 2007. It is true that Julian indicated his primary residence was in Arkansas and that while visiting Illinois, he split time between the 1005 building and Chicago. Nevertheless, Julian specifically testified that he stayed at the 1005 building on multiple occasions during his summer of 2007 visit to Illinois. As such, we cannot say the prosecutor's reference to him "living in the same building" is anything more than a reasonable inference drawn from his testimony.

¶ 94 Moreover, Julian testified that defendant remained in the hallway while Julian entered the second floor apartment, took five steps and then heard gun shots. This clearly gives rise to the reasonable inference that defendant "stayed out there where the shots were fired" as the prosecutor indicated. While the shots were fired in the stairwell leading to the hallway, the implication from the prosecutor's remarks is that Julian's testimony did not indicate that defendant went into either the second floor apartment or up to the third floor; he remained in the area from which the shots were fired.

¶ 95 The prosecutor's final comment on the evidence with which defendant takes issue pertains to Raisa's testimony. The prosecutor stated, "Do you think Raisa is going to open up to detective Odom when they're in the next room? It makes sense that she wouldn't. She is protecting [defendant] at that time." Defendant interprets the prosecutor's remarks as a comment implying Raisa failed to discuss the matter at the scene out of fear from defendant, Nitty and Julian. Noting Raisa testified that she stayed in the apartment with police for 25 minutes after they had taken the three males away, defendant claims the prosecutor's implication was deceitful and intended to mislead.

¶ 96 However, the entirety of the prosecutor's remarks regarding Raisa indicate that he

discussed two specific time frames: one when "Jamar [Julian] is there" and the other when someone from his office "reaches out to her." The prosecutor stated he believed Raisa did not "open up" to detectives at the scene in an attempt to protect defendant, not because she was afraid of him. The prosecutor specifically noted that "Jamar [Julian] wasn't talking" at this time either. Moreover, defendant spent a significant amount of time attacking Raisa's credibility for failing to offer the evidence she testified to during the trial until a month prior to trial. To allow the jury to determine what to make out of Raisa's inconsistencies, the prosecutor may argue reasonable inferences flowing from Raisa's testimony, and the circumstances surrounding it, to combat defense counsel's interpretation of the events. *People v. Williams*, 193 Ill. 2d 306 (2000).

¶ 97 While defendant characterizes these four statements as misrepresentations of the evidence, we find they merely discuss reasonable inferences drawn from the evidence adduced at trial. We find no error. "It is fundamental that if no error occurred there can be no plain error." *People v. Santiago*, 409 Ill. App. 3d 927, 931 (2011).

¶ 98 B. Comments Designed to Inflame the Jury

¶ 99 Defendant notes the prosecutor accused him of "stalking his prey," called defendant "a cold-blooded killer," and denigrated defense counsel by stating, "Are you joking? Are you really, really joking about this? I mean that argument. I mean seriously ***."

¶ 100 Defendant argues the prosecutor's "cold-blooded killer" comment was improper as no one died in this incident. Citing to *People v. Manning*, 182 Ill. 2d 193 (1998), and *People v. Robinson*, 167 Ill. 2d 53 (1995), defendant claims that the reference unfairly prejudiced the jury into believing defendant participated in other uncharged illegal conduct. Defendant, however, takes this comment out of context.

¶ 101 First, we note that *Manning* and *Robinson* each involved instances in which the State admitted evidence during its case-in-chief of other crimes committed by the respective defendants (*Robinson*, 167 Ill. 2d at 64; *Manning*, 182 Ill. 2d at 213) and only the *Manning* court found it to be error. *Id*. The only actual other crimes evidence admitted in this trial was stipulated to by defendant and pertained to the charge of unlawful use of a weapon by a felon. Defendant has cited no law supporting his conclusion that referring to someone as a "cold-blooded killer," who has been charged with shooting another in the face, is akin to improperly admitting other crimes evidence.

¶ 102 A more complete analysis of the prosecutor's remarks notes he stated, "The defense attorney said, why would he do this? He is a cold-blooded killer. He's a felon with a gun. He's standing at the top of the stairs and he is icing a guy. Three shots. Why would anyone do that?" These statements by the prosecutor were made during rebuttal to address defense counsel's argument that defendant had no motive to harm Lewis. In an attempt to provide an answer to defense counsel's query regarding motive, the prosecutor coupled these statements with a discussion of testimony regarding the appearance of weakness in the neighborhood and how defendant stared Shorts and Lewis down while smirking. If defense counsel's closing argument provokes a response, the defendant cannot complain that the State's reply in rebuttal argument denied him a fair trial. *People v. Swart*, 369 Ill. App. 3d 614 (2006). We find the statement was a proper response to defense counsel's closing argument and, when viewed in the context in which it was made, did not improperly imply uncharged conduct.

¶ 103 Defendant further claims the prosecutor improperly attacked defense counsel, thereby denying him a fair trial. The prosecutor opened his rebuttal argument by stating:

"Are you joking? Are you really, really joking about this? I mean that argument.

I mean seriously, think about what we have here. We have the defendant outside with a gun in his waistband, and this is supposed to be some kind of conspiracy to frame him, to have Earlzell Lewis go after him?"

¶ 104 Defendant claims these remarks improperly denigrated defense counsel, thereby denying him a fair trial. However, we find the prosecutor's statement constituted a permissible response to defense counsel's attacks on certain witnesses. At numerous times throughout his closing argument, defense counsel commented on his belief that certain witnesses were lying and others telling the truth in an attempt to persuade the jury that Lewis intentionally identified defendant, instead of Nitty, as the shooter during trial. The State can argue against defendant's theory of the case. See *People v. Baugh*, 358 Ill. App. 3d 718, 743 (2005) (not improper to refer to defense theory as a "joke"); *People v. Robinson*, 391 Ill. App. 3d 822 (2009) (referring to defense counsel's theory as a "fairy tale"); *People v. Love*, 377 Ill. App. 3d 306 (2007).

¶ 105 Finally, we find the prosecutor's reference that defendant was "stalking his prey" does not entitle defendant to relief. Citing to *People v. Johnson*, 208 Ill. 2d 53 (2004), *People v. Coleman*, 129 Ill. 2d 321 (1989), and *People v. Ivory*, 333 Ill. App. 3d 505 (2002), defendant claims, "It is well-established that remarks referring to a defendant as a predator are improper." The State, however, never referred to defendant as a predator.

¶ 106 At the end of his initial closing argument, without objection, the prosecutor stated, "Folks, Michael Stone, Michael Berry went to the top of that stairwell like a hunter stalking his

prey, and he did so for one reason and one reason only and that was to kill Earlzell Lewis."

¶ 107 In *Johnson*, the prosecutor twice remarked, "If you run with the pack, you share the kill." *Johnson*, 208 Ill. 2d at 80. Noting that remarks "referring to defendant as an animal are improper," the *Johnson* court found that those remarks "likened defendant to an animal." Similarly, in *Ivory*, the prosecutor referred to defendant as "just a wolf in sheep's clothing" and claimed that he "was part of a pack of predators." *Ivory*, 333 Ill. App. 3d at 517. Similarly, in *Coleman*, the State referred to defendant as "an animal, searching out his prey for money and pure pleasure in murdering." *Coleman*, 129 Ill. 2d at 348. Clearly, in *Johnson, Ivory* and *Coleman*, the State likened defendant to animals and not merely a "hunter." Our own courts have defined a "hunter" or acknowledged that a person fits a "hunter's profile" if they were wearing hunting garb or carrying a weapon in a location near a hunting situs. *People v. Layton*, 196 Ill. App. 3d 78, 88 (1990); *People v. Innis*, 237 Ill. App. 3d 289 (1992). Our legislature has defined the verb hunt as "the act of a person possessing a weapon." 520 ILCS 5/1.2k (West 2010). Neither definition equates being a hunter to being an animal.

¶ 108 Moreover, the most common usage of the word "hunter," as defined by Webster's Dictionary, is "a person who hunts." *Webster's New World College Dictionary*, 4th ed. (2010). We find no authority supporting defendant's contention that referring to him as a hunter is synonymous with calling him an animal. As such, we find the prosecutor's remarks did not equate to error. Again, it is fundamental that there can be no plain error where no error occurred. *Santiago*, 409 Ill. App. 3d at 931.

¶ 109 CONCLUSION

¶ 110 For the foregoing reasons, the judgment of the circuit court of Will County is affirmed.

¶ 111 Affirmed.

¶ 112 JUSTICE WRIGHT, specially concurring.

¶ 113 I agree with the majority's conclusions that the State provided sufficient evidence at trial to prove defendant guilty beyond a reasonable doubt. I also agree that the prosecutor's closing arguments were proper. Similarly, I join the majority's conclusion that the jury instructions regarding attempt first degree murder contained an error. Finally, like the majority, I conclude the jury instruction error does not require this court to set aside the conviction in this case.

¶ 114 However, I write separately to emphasize that even though I agree the instructional error raised by defendant in this appeal does not affect the conviction, I submit the very same instructional issue should cause this court to carefully consider, *sua sponte*, whether the enhanced sentence is void and should be set aside.

¶ 115 In this case, the State requested a sentence in excess of the statutory maximum of 30 years, based on the enhanced sentencing consideration that defendant personally discharged a firearm that proximately caused "great bodily harm" or "permanent" disfigurement to the victim, pursuant to section 8-4(c)(1)(D) of the Criminal Code of 1961. 720 ILCS 5/8-4(c)(1)(D) (West 2006). I point out that whether the victim suffered "great bodily harm" or "permanent disfigurement" was *not* an element of the offense that this jury was instructed to consider before returning a guilty verdict for the offense of attempt first degree murder (720 ILCS 5/8-4(a), 5/9-1(a)(1) (West 2006)).

¶ 116 In circumstances such as these, where an enhanced sentence is based on a factor which was not an element of the offense, our supreme court has developed pattern jury instructions and a special verdict form designed to allow the trier of fact to clearly express a finding of fact that

will support the enhanced sentence. See IPI Criminal 4th Nos. 28.00-28.06. These IPI instructions incorporate the now familiar requirements originally set out in the decision of Apprendi v. New Jersey, 530 U.S. 466 (2000).

¶ 117 In this case, the State requested an enhanced sentence based on a finding the jury was not called upon to render when deciding guilt or innocence. However, the State did not tender a special verdict form or give *consistent* definition and issues instructions that *both* contained the enhanced sentencing consideration. Hence, in my view, this jury has not clearly expressed the requisite finding for an enhanced sentence because the definition instruction omitted this consideration. Nonetheless, the court imposed an enhanced sentence without first making its own finding concerning whether the State also proved the victim suffered "great bodily harm" or "permanent disfigurement" beyond a reasonable doubt.

¶ 118 My unease in this case is based on the trial court's language when announcing the 50-year enhanced sentence. Specifically, the court stated: "[a]ll things considered on [c]ount 1, I am going to sentence the defendant to 25 years DOC with an additional 25 *regarding the use of the gun*." (Emphasis added). Based on the trial court's own remarks, I conclude the trial court itself did not make any additional factual finding that the State's evidence established, beyond a reasonable doubt, the victim in this case suffered either "great bodily harm" or "permanent disfigurement." Rather, the court imposed a sentence enhanced by 25 years based only on the premise that defendant used a gun.

¶ 119 Significantly, the use of a gun or firearm supports an enhancement limited to only 15 years, not 25 years. 720 ILCS 5/8-4(c)(1)(B) (West 2006). Therefore, based on the trial court's comment, defendant should have received a sentence of 40 years (25 years plus 15 years) rather

than 50 years. In my view, I consider the error arising out of the same jury instruction defendant has challenged in this appeal to be more serious than other *Apprendi* errors viewed as harmless by our supreme court. See *People v. Nitz,* 219 Ill. 2d 400, 411 (2006); *People v. Rivera,* 227 Ill. 2d 1, 26 (2007); *People v. Kaczmarek,* 207 Ill. 2d 288, 302 (2003).

¶ 120 I completely understand why my respected colleagues feel I have gone rogue by raising this sentencing issue *sua sponte*. Nonetheless, I am also mindful that in limited situations, our supreme court does not encourage this court to ignore void sentences, but instructs we may declare a sentence void *sua sponte. People v. Thompson,* 209 Ill. 2d 19, 25 (2004); *People v. Arna,* 168 Ill. 2d 107, 113 (1995).

¶ 121 Our supreme court has held that when a sentence has been improperly enhanced following an *Apprendi* error, the appropriate remedy is to remand the matter to the trial court. *People v. Swift,* 202 Ill. 2d 378, 393 (2002). While it may be argued that the testimony at trial clearly established that the victim, Earlzell Lewis, suffered great bodily harm, I believe remand is necessary for a trier of fact, rather than a reviewing court, to make this determination based on guidance from our supreme court. In *People v. Crespo*, our supreme court itself refused to "invade the province of the jury and decide [a] question of fact" by deciding upon review whether the victim's injuries in that case resulted from one continuous act or three separate aggravated battery charges causing great bodily harm for purposes of sentencing. *People v. Crespo,* 203 Ill. 2d 335, 344 (2001).

¶ 122 Therefore, out of an abundance of caution arising out of the constitutional concerns addressed by the court in *Apprendi,* I feel it would be appropriate in this case to remand the matter for resentencing with directions for the trial judge to carefully insure the sentence for

attempt first degree murder meets the *Apprendi* mandates, as codified by 725 ILCS 5/111-3(c-5) (West 2006).

¶ 123 Nonetheless, my respected colleagues remain unpersuaded that a remand is necessary in spite of a lengthy and healthy debate regarding my concerns. Thus, I now defer to their combined wisdom and abandon my desire to vacate the enhanced sentence sua sponte, which exceeds the maximum statutory sentence for this Class X felony by 20 years, in light of the fact that defendant has not requested such relief on appeal.