

¶ 4 From the license plate number, the police identified the car as belonging to the defendant. Less than an hour after the burglary, the police went to the home of the defendant's brother, Kent Sharp, because the police knew that the defendant sometimes stayed at this home.

¶ 5 The police spoke with the defendant's sister-in-law, Connie Sharp. Connie told the officer that Kent no longer lived in the home and that the defendant had not been there that evening. The police searched the general area looking for the defendant's vehicle, but were unsuccessful. Later, at trial, Connie testified that she lied to the officers on December 25, 2005. Kent Sharp was still living in their home. In fact, when the officers arrived at her door, Kent was in a back room of the home hiding from the police. Furthermore, Connie testified that the defendant was in their home that afternoon.

¶ 6 Kent Sharp testified that upon learning that the police were looking for his brother, he came out of his hiding place and spoke with them. He testified that his brother left his home about 60 to 90 minutes before the police arrived. About 10 minutes after the police left the home, the defendant returned to Kent's home carrying a pillowcase full of items he obtained during a residential burglary. He dumped the contents of the pillowcase out onto the floor of their home. Kent appraised the items and told the defendant that all of the items were costume jewelry and lacked value. He told the defendant to get rid of the jewelry. Without his brother's knowledge, Kent had taken two items that were not costume jewelry—a birthstone ring and an antique gold watch. Kent testified that his brother returned the next day stating that he had thrown the pillowcase containing the costume jewelry into a lake. Kent advised the defendant that this method of throwing out the jewelry would be ineffective, because the jewelry was plastic and plastic floats. The two brothers drove to the lake to retrieve the pillow case and its contents. On the drive back to Kent's home, the brothers scattered the jewelry in the countryside.

¶ 7 The morning after the burglary, the police collected two cigarette butts from the Heth home crime scene. Both items were tested for DNA. One had very strong DNA results but did not match any person in the database, while the other had weaker results with 9 of 14 alleles matching up with the defendant's profile—meaning that he could not be excluded as a match. Kent did not match the DNA collected from either item.

¶ 8 Ten months after the burglary, police approached Kent and told him that they believed he knew where the burglary proceeds were located. In response, Kent handed the police the ring and the watch. Kent gave a statement to investigator Ron Kilman implicating the defendant in the Heth burglary. He also implicated the defendant in a separate case that was not at issue in the defendant's trial.

¶ 9 After his meeting with investigator Kilman, Kent sent a letter to the defendant's attorney to tell him that some of what he told the investigator was false, due to some unspecified event that took place in December 2005. In this letter, Kent says that he was threatened with prosecution for possession of stolen property. In another part of the letter, Kent stated that he voluntarily provided the ring and the watch to police—that he called various police agencies to tell them that he had these items, even before he met with Kilman. He also claimed that although the defendant brought these items to his home, he was unaware that the items were the product of a burglary. Kent wrote that the information he fabricated during his conversation with the investigator involved the other crimes with which the defendant was separately charged. Kent was not impeached with this letter at trial.

¶ 10 The State presented evidence that the defendant repeatedly denied burglarizing the Heth home. The jury was also informed that the defendant told the police that he never let anyone drive his car, and so if his car was seen at the Heth home, then he must have been the perpetrator of the burglary. The defendant also told the police that his girlfriend did not know where he was on December 25, 2005, and that his vehicle was in Mt. Sterling the entire

day.

¶ 11 The defendant's girlfriend, Betty Jo Stock, testified at trial that the defendant left his vehicle with Kent on Christmas Eve because Kent and Connie Sharp were in need of a vehicle. She claimed that she picked the defendant up from Kent's home on Christmas day and that they spent the whole day alone at her home in Mt. Sterling—two hours from the crime scene.

¶ 12 The defendant's sister, Rhonda Neeley, testified that the defendant allowed other people to borrow his vehicle.

¶ 13 In closing arguments, the defendant's attorney argued that no one placed the defendant at the Heth home. Admittedly, the defendant's vehicle was at their home, but no one saw him drive it there. He argued that the defendant's girlfriend was more credible in her testimony that placed him two hours away from the crime scene than was the testimony of his brother Kent and sister-in-law Connie, who placed him in the neighborhood immediately after the burglary. The defendant's attorney also argued that the DNA evidence established that one of the cigarette butts found at the Heth home was smoked by the defendant, but contended that no one saw him smoke the cigarette there, and suggested that whoever drove his vehicle to the Heth home merely had to remove the cigarette butt from the vehicle ashtray and leave the butts there to implicate the defendant in that crime. He finally argued that the defendant's brother lacked credibility, and he surmised that Kent could have been hiding from the police on December 25, 2005, because he was the one who had committed the burglary at the Heth home.

¶ 14 The State countered that in order to believe the defendant's theories, the jury would have to accept that Kent hated his brother so much that he gave false evidence to the police, and that the jury must solely believe the testimony of the defendant's girlfriend, Betty Jo Stock.

¶ 15 The jury deliberated and returned a guilty verdict. The defendant was sentenced to 25 years. He appeals.

¶ 16

LAW AND ANALYSIS

¶ 17 On appeal, the defendant raises several issues. He argues that his right to a fair trial was denied by prosecutorial misconduct. He also argues that he was denied a fair trial because the invocation of his right to silence was improperly admitted into evidence. Finally, the defendant argues that he was denied the effective assistance of counsel in three respects. He argues that his attorney should have confronted his brother with prior statements that would have established a motive to frame the defendant and to lie to the police. He claims that his attorney should have objected to the State's use of evidence that he invoked his right to silence. Finally, he argues that his attorney was ineffective by not objecting to all aspects of prosecutorial misconduct. We will address each issue individually.

¶ 18

Prosecutorial Misconduct

¶ 19 The defendant contends that the prosecutor exceeded acceptable prosecutorial advocacy in his closing arguments at trial. The prosecutor argued that the evidence was overwhelmingly supportive of the defendant's guilt, that acquittal was impossible unless the jury believed that the defendant's brother was trying to frame him, and that Kent Sharp had no motivation to fabricate his testimony.

¶ 20 The State argues that the defendant failed to object to any of the allegedly inappropriate remarks, and thus the issues are forfeited. *People v. Herron*, 215 Ill. 2d 167, 175, 830 N.E.2d 467, 472 (2005). The defendant admits that he failed to object but argues that prosecutorial misconduct in closing arguments can be considered plain error. See *People v. Young*, 33 Ill. App. 3d 443, 445-47, 337 N.E.2d 40, 41-43 (1975); *People v. Slaughter*, 84 Ill. App. 3d 88, 94, 404 N.E.2d 1058, 1063 (1980); *People v. Morgan*, 20 Ill. 2d 437, 441-42, 170 N.E.2d 529, 531 (1960).

¶ 21 Prosecutors are allowed great latitude in their closing arguments. *People v. Kitchen*, 159 Ill. 2d 1, 38-39, 636 N.E.2d 433, 450 (1994). The prosecution can argue legitimate inferences derived from the evidence. *People v. Nicholas*, 218 Ill. 2d 104, 121, 842 N.E.2d 674, 685 (2005); *People v. Clay*, 124 Ill. App. 3d 140, 149, 463 N.E.2d 929, 936-37 (1984). Overall, improper remarks made in closing do not warrant a reversal of the conviction unless the remarks result in substantial prejudice to the defendant. *Id.* Reversal because of substantial prejudice is appropriate only if the prosecutor's comments constituted a material factor in the defendant's conviction. *People v. Wheeler*, 226 Ill. 2d 92, 123, 871 N.E.2d 728, 745 (2007).

¶ 22 The determination of prosecutorial misconduct and due process violations requiring reversal are reviewed on a *de novo* basis. *Wheeler*, 226 Ill. 2d at 121, 871 N.E.2d at 744. Misconduct by a prosecutor is inherently prejudicial and must be closely scrutinized because the State's Attorney's office is seen as an authoritative entity and the misconduct by a person of authority could persuade the jury to convict. *People v. Cole*, 80 Ill. App. 3d 1105, 1107-08, 400 N.E.2d 931, 933 (1980).

¶ 23 Statements That Kent Sharp Had No Motive to Lie. The defendant contends that the prosecutor's argument that Kent had no motivation to lie to the jury was false and was clearly beyond a legitimate inference that could be derived from the evidence. The defendant also argues that the prosecutor knew that this statement about Kent's lack of motivation to lie was false and that making the known false statement amounted to improper testimony on the part of the prosecutor. *People v. Bitakis*, 8 Ill. App. 3d 103, 106, 289 N.E.2d 256, 258 (1972).

¶ 24 Turning to the prosecutor's comments in closing argument related to the credibility of the defendant's brother, Kent, the prosecutor argued to the jury:

"The defense has asked a number of questions of the State's expert *** during his cross-examination of her. And she admitted, essentially, I'm a scientist. I can tell

you what's in the cigarette butt. I can't tell you how it got there. I can't tell you that. I suppose the implication is, when [defense counsel] gets his chance to make the argument here soon, that it was planted there or that it inadvertently got in the Heth residence.

If the defense theory is the cigarette butt was planted, I don't do this very often, but I'll challenge [defense counsel] to tell us where's the motive? Where is the motive at? And give us something other than [defense counsel's] theory and speculation because there is no evidence to support a motive that brother Kent planted a cigarette in a house that he had just committed a burglary in and then came in here and lied about it. There is no evidence of it. That he would come into court, lie, face yet another criminal charge, all to cast doubt on his brother when Stanley Kent Sharp wasn't even a suspect in the case. Something more than theories and speculation about a motive for doing that would be nice."

In rebuttal, the prosecutor commented upon the defendant's closing argument as follows:

"The evidence is overwhelming, respectfully. There is only one way that I can say you could ignore the overwhelming evidence that proves this defendant guilty beyond a reasonable doubt, and that's if you do two things. One, you believe the girlfriend's story that Brett Sharp was with her Christmas day in Mount Sterling, Illinois. And two, you believe that Kent Sharp so hated his brother, although there is no evidence of that, that Kent Sharp so hated his brother that he put a cigarette butt in the house to throw attention to Brett that he committed this crime. That he tried to frame his brother by planting a cigarette butt."

¶ 25 Having reviewed the remarks of the prosecutor, we do not find that the defendant can establish the burden necessary on appeal—that the remarks were so prejudicial as to have denied him a fair trial. A major defense theory in this case was that Kent lied at trial and was

motivated to lie because he himself was the Christmas night burglar of the Heth home. The defense contended that Kent, as the actual criminal, pinned the crime on his brother by utilizing his vehicle and planting his DNA via a cigarette butt at the scene of the crime. Given this theory, we find that the above-referenced argument by the prosecutor at the end of the case amounted to no more than a commentary on the defendant's theory, which is permissible. *Nicholas*, 218 Ill. 2d at 121, 842 N.E.2d at 685; *Clay*, 124 Ill. App. 3d at 150-51, 463 N.E.2d at 937-38. More specifically, the prosecutor can comment upon the absence of evidence supporting a defense theory, and doing so does not reverse the standard of proof for a conviction. See *People v. Glasper*, 234 Ill. 2d 173, 212, 917 N.E.2d 401, 424 (2009) (holding that the State's question to the jury, "[w]here's the evidence," did not shift the burden of proof to the defendant and only amounted to a commentary on the lack of support for the defendant's theory that his confessions were coerced).

¶26 The defendant alternatively contends that the prosecutor knew that Kent had a motive to lie to the police and to the jury, and thus, the prosecutor's statement was improper prosecutorial testimony. The defense theory about Kent Sharp was made clear to the jury, via statements, cross-examination of witnesses, and closing argument. There is no proof that Kent lied to the police and to the jury. Therefore, there is no proof that the prosecutor knew that Kent lied or had a motive to lie. To support his theory that the prosecutor knew that Kent was lying, the defendant attempts to utilize a letter that Kent Sharp wrote to the defendant's attorney in which he claimed that he lied to the police investigators. This letter, however, was not in evidence and does not serve to support the defendant's misconduct claim that based upon the evidence, the prosecutor lied about Kent Sharp's lack of a motive. The jury heard evidence supporting the defendant's motive. As the trier of fact, the jury had the ability to assess the credibility of the witnesses and could weigh the testimony and credibility against the prosecutor's and the defense arguments. In doing so, the jury obviously rejected

this theory. We conclude that this argument is also without merit.

¶ 27 Reversal of Burden of Proof. The defendant also argues that the prosecutor's argument served to improperly reverse the burden of proof. By challenging the defendant to prove that his brother had a motive to lie, the defendant argues that these statements are the equivalent of making him prove his innocence. Having reviewed that portion of the prosecutor's argument as well as the totality of his closing arguments, we disagree. As stated earlier, the prosecutor was merely commenting about the lack of support for the defendant's theory of the case. The defendant cites several cases which he contends are analogous—where the prosecutor's arguments were considered erroneous and required reversal because the burden of proof was reversed. Those cases, however, do not support the defendant's theory because none dealt with a prosecutor commenting upon a defense theory. In all the cases cited, the prosecutors argued to the jury that the defendants did not meet their burdens to establish reasonable doubt. See *People v. Weinstein*, 35 Ill. 2d 467, 469, 220 N.E.2d 432, 433 (1966) (Illinois Supreme Court found error in prosecutor argument insisting that defendant bore the burden of establishing reasonable doubt); *People v. Giangrande*, 101 Ill. App. 3d 397, 402, 428 N.E.2d 503, 507-08 (1981) (prosecutor's argument asking "where's the evidence that the defendant didn't do it" shifted the burden of proof to the defendant); *People v. Harbold*, 124 Ill. App. 3d 363, 371-72, 464 N.E.2d 734, 741-42 (1984) (repeated prosecutorial arguments that no evidence was presented showing that defendant did not commit the crime or that the defendant was not guilty served to shift the burden of proof to defendant); *People v. Tyson*, 137 Ill. App. 3d 912, 921-22, 485 N.E.2d 523, 530 (1985) (prosecutor's argument to the jury that the defendant failed to present the jury with a theory of innocence resulted in reversible error). These cases involve very different arguments than the prosecutor made in this case. The prosecutor did not argue that the defendant needed to prove reasonable doubt. The defendant presented a theory to this jury, and the prosecutor

criticized that theory and the evidence that allegedly supported the theory. While the prosecutor argued that the evidence was overwhelming in proof of the defendant's guilt, the prosecutor did not ask the jury to hold the defendant responsible for proof of his innocence. Consequently, the prosecutor's argument did not function to switch the burden of reasonable doubt to the defendant.

¶ 28 The defendant did not establish that prosecutorial misconduct during his trial denied his right to a fair trial. The comments by the prosecutor in closing arguments did not constitute a material factor in the defendant's conviction. Accordingly, the defendant's arguments fail.

¶ 29 Invocation of Right to Silence Admitted Into Evidence

¶ 30 The defendant next argues that he was denied a fair trial because a State witness testified that he invoked his right to silence. The witness who made this statement in his testimony was Officer Brad Phegley. Officer Phegley interviewed the defendant on August 31, 2006, and he attempted to ask the defendant questions about his whereabouts on December 25, 2005. When that question was posed to the defendant, the defendant told Officer Phegley that he was "done talking" to him.

¶ 31 The law is clear that irrespective of provision of *Miranda* warnings, a defendant's postarrest silence is inadmissible evidence because "such evidence is neither material nor relevant, having no tendency to prove or disprove the charge against a defendant," and is prejudicial. *People v. Clark*, 335 Ill. App. 3d 758, 763, 781 N.E.2d 1126, 1129-30 (2002); *People v. Lampson*, 129 Ill. App. 2d 72, 74-75, 262 N.E.2d 601, 602-03 (1970); *People v. Lewerenz*, 24 Ill. 2d 295, 299, 181 N.E.2d 99, 101 (1962); *People v. Rothe*, 358 Ill. 52, 57, 192 N.E. 777, 779 (1934).

¶ 32 Having reviewed the testimony of Officer Phegley, the testimony at issue is not nearly as certain as the defendant contends on appeal. The "done talking" reference is all that was

said by Officer Phegley. The record reflects that the exchange with Officer Phegley and the defendant took place during questioning about the defendant's whereabouts on December 25, 2005. Officer Phegley informed the defendant that his vehicle had been seen at the site of a burglary. The defendant told Officer Phegley that he had his vehicle on that date, that he had not left Mt. Sterling, and that he had witnesses in Mt. Sterling who would support his alibi. When asked, apparently for a second time, where the defendant was on December 25, 2005, the defendant responded by stating that he was "done talking" to Officer Phegley. Reviewing all of Officer Phegley's testimony and not just this excerpted exchange, it is clear that the prosecution was seeking to dispute the defendant's claims about the location of his vehicle on that date and that he spent the entire day in Mt. Sterling with his girlfriend. Officer Phegley did not elaborate on the defendant's statement in his testimony before the jury. The prosecutor did not reference the defendant's termination of the interrogation. The precise words chosen by the defendant in his interview with Officer Phegley are subject to interpretation and do not necessarily mean that the defendant was invoking his constitutional right to silence.

¶ 33 Furthermore, the reference made by Officer Phegley was inadvertent and was in response to a broad question. The words used by the defendant and restated by Officer Phegley did not specifically make any reference to the defendant's exercise of his constitutional rights. The State never mentioned the defendant's comment to Officer Phegley again and did not argue the point in closing arguments to the jury. We do not agree with the defendant's claim that this comment by Officer Phegley informed the jury that he invoked his constitutional right to silence. However, if we assume that Officer Phegley's comment was erroneous, we conclude that the error was harmless. *People v. Lampkin*, 251 Ill. App. 3d 361, 370, 622 N.E.2d 42, 47 (1993).

¶ 34

Ineffective Assistance of Counsel

¶ 35 A criminal defendant is guaranteed the competent assistance of trial counsel by our federal and state constitutions. U.S. Const., amend. VI; Ill. Const. 1970, art. I, § 8. Constitutionally competent assistance is measured by a test of whether the defendant received "reasonably effective assistance." *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

¶ 36 In defense of a criminal defendant, trial counsel has a duty to object to damaging arguments, and failure to do so could be considered ineffective assistance of counsel. *People v. Rogers*, 172 Ill. App. 3d 471, 477-78, 526 N.E.2d 655, 660-61 (1988). In pursuit of a defense, we presume that defense attorneys utilize sound trial strategies. See *Strickland*, 466 U.S. at 689. Trial strategies are considered to be unsound if no reasonably effective criminal defense attorney, in similar circumstances, would pursue those strategies. *People v. Faulkner*, 292 Ill. App. 3d 391, 394, 686 N.E.2d 379, 382 (1997).

¶ 37 To prevail on an ineffective-assistance-of-counsel claim, "[the] defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *People v. Lefler*, 294 Ill. App. 3d 305, 311, 689 N.E.2d 1209, 1214 (1998) (citing *Strickland*, 466 U.S. at 695). The term "reasonable probability" has been defined to mean "a probability sufficient to undermine confidence in trial's outcome." *Lefler*, 294 Ill. App. 3d at 311-12, 689 N.E.2d at 1214 (citing *Strickland*, 466 U.S. at 687). Legal errors, without more, do not necessarily meet the definition of "ineffective" legal assistance. We must examine the issue from the perspective of whether the defendant received a fair trial—one "resulting in a verdict worthy of confidence." *Lefler*, 294 Ill. App. 3d at 312, 689 N.E.2d at 1214 (citing *People v. Moore*, 279 Ill. App. 3d 152, 161-62, 663 N.E.2d 490, 498 (1996)).

¶ 38 Failure to Confront Kent Sharp With Statements He Made in a Letter. The defendant

contends that his attorney was ineffective for failing to confront his brother, Kent, with statements he included in a letter written to the defendant's attorney. Those statements indicated that he fabricated some aspects of what he told the officers about the defendant due to his own fear of prosecution for possession of stolen property. At trial, defense counsel decided that strategically he could not impeach Kent with anything from Kent's letter because to do so could open the door to the State's introduction of the other crime. The other crimes at issue were felony charges of home invasion and aggravated criminal sexual assault—both stemming from events that occurred in June 2006.

¶ 39 We have reviewed the letter from Kent Sharp to the attorney representing the defendant in the home invasion and sexual assault case to determine what evidence was "fabricated." In this letter, Kent outlines the exact lies he told investigator Kilman. He reiterates that he knew that the defendant brought the burglary items into his home. He does not say that he lied about the burglary. The lies he told the investigator all involve the home invasion and sexual assault case. He states that he lied about items he saw in the defendant's vehicle—rope and a gag ball. He also claims that he lied that the defendant told him he had a date with a girl at the Lake Point Apartments (the situs of the home invasion and sexual assault). While these "lies" were created because of fear that Kent could be prosecuted for harboring stolen goods taken by the defendant in the burglary of the Heth home, the "lies" have no bearing on the facts of this case, other than on Kent Sharp's overall character.

¶ 40 In denying this aspect of the defendant's motion for a new trial on March 30, 2009, the trial court concluded that the trial attorney's decision to avoid reference to this letter in order to keep evidence of the other pending charges against the defendant out of this case was strategically based. We agree with this assessment. Prior to this burglary trial, the defendant had already been convicted in the home invasion and sexual assault, for which he was sentenced to life in prison. Utilizing the letter for cross-examination purposes certainly

could have opened the door to entry of evidence of these charges and the defendant's conviction. Trial counsel had other bases upon which he could cross-examine Kent Sharp, and the record reflects that he did so.

¶ 41 Counsel was not ineffective for refusing to cross-examine Kent Sharp with the contents of this letter.

¶ 42 Lack of Objection to State's Use of Invocation of Right to Silence. As indicated earlier in this order, we did not find that the defendant was denied a fair trial by the prosecution's introduction by witness Officer Phegley or that the defendant indicated that the interview was over. We are unable to conclude that introduction of this phrase informed the jury that the defendant invoked his constitutional right to silence. The nature of the defendant's comment as repeated by the officer in trial testimony, as well as the context of the questioning, did not support the defendant's claim that he was denied a fair trial. Similarly, we find no error on the part of the defendant's attorney who did not object to this one answer by Officer Phegley. In fact, the defendant's attorney utilized that comment on cross-examination to inquire further, providing the jury with the emotional background of that interview. Through the cross-examination of Officer Phegley, the jury learned that the defendant was clearly frustrated. Officer Phegley was not accepting the defendant's protestations of innocence. The defendant's argument that counsel was ineffective by failing to object to this question is without merit.

¶ 43 Failure to Object to Prosecutorial Misconduct. For the same reasons that we found that the prosecutorial remarks in closing did not deny the defendant's right to a fair trial, we conclude that the defendant's attorney was not ineffective for failing to object. The comments at issue were nothing more than a commentary upon the evidence and upon the defendant's alibi. Consequently, had counsel objected to these alleged incidents of prosecutorial misconduct, the outcome of the trial would not have been any different than it

was. Therefore, the defendant's claim of ineffective assistance of counsel on this basis fails.

¶ 44 Conclusion on Ineffective Assistance Claims. We do not find that trial counsel was ineffective on any of the issues the defendant raises on appeal. The defendant does not establish that there is a reasonable probability that the jury would not have convicted him but for the alleged errors of his attorney.

¶ 45 **CONCLUSION**

¶ 46 For the foregoing reasons, the judgment of the circuit court of Effingham County is hereby affirmed.

¶ 47 Affirmed.