

No. 1-10-1662

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,) Appeal from
) the Circuit Court
Plaintiff-Appellee,) of Cook County
)
v.) No. 09 CR 16827
)
ROGER SIMS-BEY,) Honorable
) Stanley J. Sacks,
Defendant-Appellant.) Judge Presiding.

JUSTICE PALMER delivered the judgment of the court.
Presiding Justice McBride and Justice Taylor concurred in the judgment.

ORDER

¶ 1 **Held:** Defendant was not denied his right to present a complete defense where defendant demanded immediate trial before he received all of the discovery he requested and where that discovery was disclosed and was not material to his guilt or innocence. Defendant forfeited his claim regarding improper conduct by the prosecution where none of the prosecutions's comments rose to the level of plain error and where defendant failed to adequately raise the issue of improper leading questions. The prosecution did not knowingly use perjured testimony where the testimony at issue was not perjury and did not affect the jury's verdict. Defendant did not receive ineffective assistance of pre-trial counsel where he suffered no prejudice after discharging that counsel and representing himself. The trial court did not abuse its discretion when it denied defendant's request for standby counsel.

¶ 2 Following a jury trial, defendant Roger Sims-Bey was found guilty of being an armed habitual criminal, aggravated unlawful use of a weapon by a felon and aggravated assault of a peace officer. The trial court sentenced defendant to 17 years' imprisonment for the armed habitual criminal conviction and to a concurrent term of 3 years' imprisonment for aggravated assault of a peace officer. On appeal, defendant contends that the trial court denied him his right to present a complete defense, that the cumulative effect of misconduct by the prosecution denied defendant a fair trial and that the court abused its discretion when it denied defendant's request for standby counsel. For the reasons that follow, we affirm.

¶ 3 Defendant was arrested and charged by indictment with aggravated unlawful use of a weapon, aggravated assault of a peace officer and with being an armed habitual criminal. At defendant's arraignment, on October 6, 2009, the trial court appointed the Cook County Public Defender to represent defendant and an assistant public defender appeared on his behalf. On October 26, a different assistant public defender appeared on defendant's behalf and requested a continuance to review discovery tendered by the State. The court granted that request as well as a motion by the State to compel defendant to submit to have his fingerprints taken on November 5. On November 16, the same assistant public defender appeared in court on defendant's behalf. Defendant was also present in court on that date and informed the trial court that he wished to fire the public defender's office and proceed *pro se*. Defendant also told the court he objected to the State's request for fingerprinting. The court told defendant that it did not have time to admonish him that day about representing himself because it had a trial starting later that afternoon and that the public defender would remain his attorney for the time being. The

assistant public defender agreed to a continuance until November 25, 2009, and defendant told the court that, "for the record," he did not agree to a continuance.

¶ 4 At a status hearing on November 25, defendant reiterated his desire to proceed *pro se*. The court advised defendant as to the charges against him and the possible penalties he could face if found guilty. Defendant indicated that he understood. The court also confirmed defendant's understanding that it would appoint an attorney to represent him for free if that is what defendant wanted. The court admonished defendant about the numerous risks of representing himself, including that the State would be represented by an attorney with substantially more experience than defendant, that defendant might not know when to make appropriate objections and that defendant could make tactical decisions regarding his trial that could have unintended consequences. The court further admonished defendant that the effectiveness of his defense could be diminished because of his dual role of attorney and accused, that an attorney would be able to provide him important assistance and that defendant would not receive special consideration, such as increased access to the prison law library, if he went *pro se*. Defendant indicated that he understood. Finally, the court explained to defendant that it had discretion to appoint standby counsel but that it would not do so in this case because "[t]his is not a complicated case" and because "although there are a number of charges they are basically the same indictment." Defendant again said that he understood. After hearing these admonishments, defendant confirmed that he wanted to represent himself and the court allowed the Public Defender's office to withdraw as counsel for defendant.

¶ 5 At the conclusion of the November 25 status hearing, the State advised the court that it

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had already tendered additional discovery to defense counsel but that some of that material would now have to be redacted because it was being given directly to defendant. The court asked defendant if he would agree to a continuance until December 4. Defendant refused and instead demanded trial. The court told defendant that it would therefore bring him back to court at an earlier date and that "if can get a jury together we will try the case next week." The court advised defendant that if that occurred, he "probably won't have all the discovery in the case." Defendant said he understood and the case was continued.

¶ 6 At a hearing on November 30, defendant confirmed to the court that he was still demanding trial. The court again advised defendant that he would receive any discovery the State had but that he might not receive until a later date any discovery the State was still trying to obtain. Defendant said that he understood. Defendant then filed a motion to dismiss and objected when the State asked for a continuance to review the motion. The court continued the case, noting that defendant was demanding an immediate trial while simultaneously filing a motion to dismiss.

¶ 7 Following a hearing on December 3, the court denied defendant's motion to dismiss. Defendant asked for additional discovery from the State, including "a videotape," and reiterated that he was still demanding trial. The State said that the only videotape it was aware of was a crime scene video that it had not yet received from the police. The court told defendant that he could not demand trial and simultaneously ask for more discovery that would take time to obtain. The court said that defendant would receive any discovery the State had and that if defendant wanted more discovery he had to "wait to get it." The State informed the court that it had given

defendant all of the discovery currently in its possession. Defendant said that was "okay" and that he was still demanding trial. The court reiterated to defendant the possible range of sentences he could receive if he was found guilty and again confirmed that defendant wanted to represent himself. Defendant said that he understood the sentences he could face and that he wanted to go *pro se*. Defendant then asked for standby counsel to help select a jury. The court denied the request, telling defendant that he did not have a right to standby counsel and that defendant could either go *pro se* or have an attorney appointed to represent him.

¶ 8 When the parties appeared in court on January 5, 2010, the State told the court that it could not proceed with trial because the victim in the case, Sergeant James Buhrke, had injured himself and would not be available for a week. Defendant said that he was still demanding trial and then filed a motion for a bill of particulars.

¶ 9 At a status hearing on January 7, the State provided defendant with additional discovery material that it had received. The State also filed an answer to defendant's motion for a bill of particulars in which it stated that "[t]he People are unaware of any evidence or witnesses which may be favorable to the defense in this case."

¶ 10 The court held a hearing on defendant's motion for a bill of particulars on January 8. During that hearing, the court noted that defendant had requested additional discovery and told defendant that "if the State has them, they will give them to you." Defendant then said that he had been given photos of a squad car but that he was pulled over by a "Tahoe truck." Defendant speculated that the truck was equipped with a video recorder and that this is why the State "switched" vehicles. The court told defendant that he had received all of the police reports and

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that the State indicated that defendant was pulled over by a squad car. The State then informed the court that it had been made aware that morning that a forensic scientist with the Illinois State Police had examined the bullet recovered from the chamber of the gun that defendant allegedly possessed. The State said that there was no "mark on the primer" and that, while it had not yet spoken to him, the forensic scientist would likely have an opinion as to whether that weapon had been fired. The State further indicated that a physical lab report had not yet been drafted. The court stated that "in theory that could be exculpatory" and the State agreed. Defendant also requested a roll-call roster from the date of the incident and any camera footage from Sergeant's Buhrke's vehicle "or any other police vehicle assigned to Unit 153." The court inquired as to the relevance of the roll-call roster, to which defendant responded that "it would reveal that a particular Tahoe was in fact assigned to Sergeant Buhrke on that particular day." The court responded that defendant would receive that information if the State could obtain it by trial. The court reiterated that defendant was entitled to all discovery but that some of that material took time to obtain and that defendant could either continue to demand trial or wait for the discovery he had requested. The State represented to the court that it was unaware of any camera footage after speaking with the detectives involved in the case and that it would ask Sergeant Burkhe if he had any type of camera in his vehicle. The State objected to defendant's request for footage from any other vehicle on the ground that the request was too onerous. The court sustained that objection and told defendant that if there was any footage from a vehicle involved in the incident the State would attempt to obtain it by trial.

¶ 11 The court then reviewed defendant's request for the 911 audio dispatch tapes from the day

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of the incident. The court told defendant that he had been provided with transcripts of those tapes and that defendant would receive the physical copies of the tapes if the State could obtain them by trial. The court then reviewed defendant's request to examine the physical evidence. The State told the court that some of that evidence was still at the crime lab because defendant had refused to be fingerprinted and that, despite the court's order, the jail had not brought defendant for fingerprinting. The intention of the State was to compare those prints to any latent prints recovered from the gun. That gun had also been swabbed for DNA but that had not been tested because the latent prints had not been examined. The court asked defendant if he still refused to submit to fingerprinting and defendant said that he did.

¶ 12 On January 11, defendant moved to discharge the case for a violation of the Speedy Trial Act. The court denied the motion. The State tendered to defendant additional discovery that it had received. The jury was selected and trial was to begin the following day.

¶ 13 The parties appeared in court on January 12 for the start of trial. Before trial began, the State told the court that the DNA swabs from the firearm involved in the incident had not yet been tested and that the firearm allegedly in defendant's possession had not yet been tested for latent fingerprints because defendant had refused to submit to fingerprinting and the State had not had time to do the testing because defendant had demanded trial. Therefore, the State said that it was proceeding without that evidence. The State then made an oral motion *in limine* to preclude defendant from arguing at trial about the lack of fingerprint evidence. The court asked defendant if he planned to bring out the lack of fingerprint or DNA evidence and defendant said that he did. The court granted the State's motion, telling defendant that the testing would have

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been done but that the State did not have time to conduct the test because defendant had demanded trial. Defendant claimed that he had already been fingerprinted twice in connection with the case and that his prints were therefore already in the State's computerized system. Defendant said that the State had the ability to submit any prints found at the scene into the computer to determine if there was a match. The court said that "apparently that wasn't done" and the prosecution said "no." The court told defendant that the State had not had time to conduct any fingerprint analysis because of defendant's trial demand and that defendant could not argue about the absence of such evidence.

¶ 14 Defendant then made a motion for the appointment of standby counsel other than the public defender to assist him during trial. The court denied the request, telling defendant that he had been advised that standby counsel would not be appointed in this case and that the jury and the witnesses were already present at court and the State was ready to begin trial. Defendant asked to speak to his mother, who was present at the time, and the court allowed him to do so. Defendant returned and told the court that his mother told him that a person named "James Muhammad" had information pertaining to the "Tahoe that was taken off the scene." Defendant confirmed that he had not spoken to the witness himself and asked for a subpoena to be issued for that witness. The court responded that the witness could testify if defendant could get him to court but that it was not the State's obligation to subpoena witnesses for defendant. The court reminded defendant that it had previously advised him that getting witnesses to come to court was one of many problems with going *pro se*. The court concluded that if defendant's mother could get the witness to court, the State would talk to him and the witness might be able to

testify. The State revisited the fingerprint issue and told the court that it was its understanding that the crime lab had the capacity to compare any fingerprints that defendant submitted when he was arrested with any suitable latent prints recovered from the crime scene. The State said that if defendant intended to argue the issue, the State should be allowed to elicit from a witness from the crime lab that testing had been pending but that the trial began before the testing could be done. The court responded that if defendant brought the issue up, "we'll do it then."

¶ 15 The case then proceeded to trial, where the following evidence was presented.

¶ 16 Robert Dishman testified that on August 15, 2009, he and his friends Marcus Boswell and Muhammad Mustafa got a ride from defendant to go to a picnic at a nearby park. Defendant was driving the car, a white Pontiac, while Fisher was in the front passenger seat and Dishman, Boswell and Mustafa sat in the back. The picnic was over when the group arrived so they drove back to the area of 52nd and Carpenter Street to drop off Dishman, Boswell and Mustafa at Mustafa's house. When defendant stopped the car in front of Mustafa's house, Dishman noticed a police car pull up behind them with its emergency lights activated. Defendant got out of the car, grabbed a handgun that he had been sitting on and ran toward the middle of the street. Dishman heard gunshots and saw a police officer chase after defendant. Dishman ducked and put his hands in the air. He was brought to the police station, where he told police what happened and identified a photograph of defendant as the person who grabbed a gun and ran out of the Pontiac. The State then showed defendant a photograph of the gun recovered near the lot and Dishman testified that it looked like the gun that defendant was sitting on when he got out of the car. On cross-examination, Dishman testified that he did not see defendant point his gun at the police

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officers.

¶ 17 Angela Fisher testified that defendant drove the group to the picnic while she sat in the front passenger seat and three men she did not know sat in back. They arrived at the park but left quickly because the party was over. They drove back to the area of 52nd street and Racine and eventually stopped to drop off one of the men in the back of the car. Defendant exited the vehicle and said "oh sh**." Fisher looked back and saw a police car parked behind them with its emergency lights activated. Fisher heard three gunshots after defendant exited his vehicle and then one of the police officers pursued defendant down the street. Another police officer retrieved Fisher from the car and brought her to the police station. She identified defendant in a photo array and subsequently in a lineup as the person who was driving the Pontiac. On cross-examination, Fisher testified that "Johntae Johnson" owned the Pontiac. Fisher did not see who was doing the shooting, only that she heard the shots. Fisher testified that when she entered and exited the vehicle that day, she never saw a weapon on the front seat of the car or in defendant's lap.

¶ 18 Marcus Boswell testified that he did not know the man that drove Boswell and his friends to the picnic in the Pontiac. According to Boswell, the police pulled their car over in the area of 52nd Street and Carpenter and, when Boswell looked back, he saw an officer get out of the squad car and pull out a weapon. Boswell then heard gunshots. He saw another officer by the passenger side of the "vehicle" and Boswell put his hands in the air and ducked behind the seat. Boswell was ordered out of the car by police and then taken to the police station for questioning. On cross-examination, Boswell testified that the driver of the Pontiac did not run the stop sign as

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the police had claimed. Boswell also did not see the driver running down the street but testified that he noticed that the driver was "gone" The police fired their weapons but Boswell never saw a weapon in the Pontiac. Boswell gave a statement at the police station but denied that it was given voluntarily.

¶ 19 Chicago police officer James Buhrke testified that he was on patrol with his partner, Officer Kevin Keel, on the night of August 15, 2009. The officers were in uniform and were driving in a marked squad car. At approximately 9 p.m., Sergeant Buhrke was in the area of 52nd Street and Racine when he observed a white Pontiac run a stop sign and continue eastbound. The officers followed the vehicle for approximately three blocks until it came to stop. Sergeant Buhrke pulled his squad car behind the Pontiac and turned his emergency lights on to conduct a traffic stop. The street lights were on at the time and Sergeant Buhrke had no trouble seeing the Pontiac in front of him. He saw multiple occupants inside that vehicle and then observed the vehicle's driver's side door "fly open very quickly," which the sergeant considered to be an aggressive movement. The driver of the Pontiac, who Sergeant Buhrke identified as defendant, exited the vehicle while holding a firearm in his right hand that was supported by his left hand at chest level. Defendant was about 20 feet away from Sergeant Buhrke at this time. The sergeant explained that he was afraid for his life at this point because the manner in which defendant held the weapon indicated that he may have had professional training with firearms.

¶ 20 Sergeant Buhrke drew his sidearm and yelled at defendant to drop the weapon. Defendant did not comply. Instead, defendant ran southwest across the street until he got onto a parkway, at which point he turned and aimed his gun at Sergeant Buhrke. Defendant was about

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40 feet from the sergeant at this time. Sergeant Buhrke then fired his weapon three times at defendant. Defendant did not stop and drop his weapon but instead continued to run down the street. Sergeant Buhrke followed defendant while his partner remained with the other occupants of the Pontiac. At some point, defendant then turned and pointed his gun at Sergeant Buhrke in the same manner as before. Sergeant Buhrke responded by firing his weapon once at defendant. Sergeant Buhrke then continued to chase defendant, who eventually ran into a vacant lot and threw his gun to the ground with his right hand. Defendant continued to run away, but the sergeant remained with the gun defendant threw to the ground. He explained that he did not continue to pursue defendant because defendant was no longer a threat and because he thought that defendant could be identified. Sergeant Buhrke was also afraid that someone else could pick up the gun while he was chasing defendant and he was concerned for his partner because he knew there were multiple occupants in the Pontiac.

¶ 21 Sergeant Buhrke radioed fellow police officers with a description of defendant and his path of flight. Other officers arrived and relieved the sergeant of guarding the gun. Sergeant Buhrke returned to his partner and spoke to detectives who had arrived at the scene. The sergeant spoke to detectives at the police station that night and early the following morning and identified a photograph of defendant as the person who pointed a gun at him. On August 19, Sergeant Buhrke made the same identification when he viewed a lineup at the police station.

¶ 22 Officer Keel testified to substantially the same version of events as Sergeant Buhrke. Like his partner, Officer Keel testified that defendant exited his vehicle holding a handgun and then pointed it at Sergeant Buhrke. Officer Keel also drew his sidearm after he saw that

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defendant was holding a gun and aiming it Sergeant Buhrke. Officer Keel testified that his partner initially fired three shots at defendant and that he later fired another shot. Officer Keel remained near the Pontiac while Sergeant Buhrke pursued defendant. Officer Keel eventually lost sight of his partner and defendant when they ran to the vacant lot and turned west. While his partner pursued defendant, Officer Keel remained at the scene to radio for help and to secure the other four occupants of the Pontiac. There was a female in the front passenger seat and three males in the rear of the vehicle. Later that night, Officer Keel was at the police station and identified defendant from a photo array as the person who exited the Pontiac and pointed a handgun at Sergeant Buhrke. He made the same identification of defendant when he viewed a lineup at the police station on August 20.

¶ 23 Diane Terry observed some of these events from her bedroom window in a second-floor apartment at 1022 West 52nd Street. Terry was watching television on the night of August 15 when she saw a white car and "heard it screech." She saw a police car pull up behind the white car with its emergency lights on. An African-American man then jumped out of the white car from the driver's side with a gun in his hand. Terry testified that she saw "fire from the gun, from that gun" and that "they was shooting at the police." She then testified that the person who jumped out of the white car ran into the street for a short while and had a gun pointed at the police at about the same time that Terry heard shots. Terry watched this man run toward a vacant lot and then she heard additional shots being fired. One of the police officers followed this man "as they was shooting." Terry lost sight of this man after he turned into the vacant lot. Terry also heard the police tell the man to stop at some point after he got out of the car. Terry

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acknowledged that she could not identify the face of the man who jumped out of the car.

¶ 24 Detective James O'Brien testified that he was assigned to investigate the case. He went to the scene and spoke to Sergeant Buhrke and Officer Keel. Detective O'Brien walked through the scene and found three spent cartridge cases across the street from where the Pontiac was parked and one spent cartridge further down the street. Detective O'Brien also saw the .9 millimeter semiautomatic handgun that another officer was guarding in a vacant lot at 5218 South Carpenter. Examination by the Illinois State Police crime lab found that the four spent cartridges were fired from Officer Buhrke's handgun. Detective O'Brien also testified that upon learning defendant's name in the early morning hours of August 16, he assembled a photo array and showed it to Sergeant Buhrke and Officer Keel. Both officers identified a photograph of defendant as the person who fled from the car and pointed a gun at Sergeant Buhrke. The detective was unable to locate defendant at that time.

¶ 25 While Detective O'Brien was walking through the crime scene, Detective Roberto Garza was interviewing Fisher, Dishman, Boswell and Mustafa at the police station. Detective Garza testified that he assembled a photo array and that Fisher identified defendant as the driver of the Pontiac who fled on foot after she heard gunshots. Dishman looked at the same photo array and identified defendant as the person who fled from the car with a gun.

¶ 26 Defendant was ultimately arrested in Indiana on August 17. He had a gunshot wound to the left side of his chest when he was arrested and was treated for that wound at the scene of his arrest and eventually brought to the police station in Chicago. Detective O'Brien arranged two physical lineups which included defendant. Sergeant Buhrke viewed one lineup and identified

defendant as the person who fled the Pontiac and twice pointed a gun at him. Officer Keel viewed the other lineup and identified defendant as the person who pointed a gun at Sergeant Buhrke. On the evening of August 20, Detective Garza conducted a physical lineup from which Fisher identified defendant as the driver of the Pontiac who fled from the police.

¶ 27 At the conclusion of its case, the State presented stipulations that indicated defendant had been convicted of four prior qualifying felony offenses.

¶ 28 Defendant called Detective O'Brien and Sergeant Buhrke as witnesses. Both reiterated much of their prior testimony. Defendant did not testify on his own behalf.

¶ 29 During deliberations, the jury sent a note to the court asking if defendant's fingerprints were found on the gun. With the parties agreement, the court instructed the jury to continue deliberating. The jury returned a verdict of guilty on all counts.

¶ 30 At a subsequent status hearing, the trial court granted defendant's request to have an attorney appointed to represent him for post-trial motions and sentencing. The court appointed an attorney other than a public defender. At that hearing, the State informed the court that it had received a voicemail from the Illinois State Police crime lab stating that the results of the analysis of the latent fingerprints recovered from the Pontiac showed the prints were from defendant. The trial court denied defendant's post-trial motion, which asserted numerous claims of error. The court later sentenced defendant to 17 years' imprisonment for the armed habitual criminal conviction and 3 years for the aggravated assault of a peace officer conviction. This appeal followed.

¶ 31 Defendant first contends that he was denied his rights to access discoverable information,

to argue the absence of physical evidence and to subpoena and call witnesses on his own behalf. He first claims that the trial court's rulings denied him his right to obtain evidence from the prosecution that was material to defendant's guilt or innocence. Defendant argues that the court used his demand for trial against him to dissuade and preclude him from obtaining discovery that would have been helpful to his case. Defendant claims he was denied a laboratory report regarding the examination of the bullet found in the chamber of the gun that was allegedly in his possession, the roll-call roster which would have shown what vehicles were equipped with video cameras and the 911 audio dispatch recordings from the date of the incident. In a related argument, defendant claims that the court erred by precluding him from arguing during trial about the lack of fingerprint and DNA evidence.

¶ 32 In *Brady v. Maryland*, 373 U. S. 83, 87 (1963), the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt as to the defendant's guilt. *United States v. Agurs*, 427 U.S. 97, 112 (1976).

¶ 33 The admission of evidence lies within the sound discretion of the trial court, and a reviewing court will review the trial court's ruling only for an abuse of discretion. *People v. Leak*, 398 Ill. App. 3d 798, 824 (2010). Similarly, a claim that the trial court improperly limited discovery is reviewed for an abuse of discretion. *People v. Graham*, 406 Ill. App. 3d 1183, 1189 (2011). An abuse of discretion occurs "only where the [trial court's] ruling is arbitrary, fanciful,

or unreasonable, or where no reasonable person would take the view adopted by the trial court."

Leak, 398 Ill. App. 3d at 824.

¶ 34 We initially find that defendant has waived his right to complain about the discovery material that he did not receive. Defendant attempts to frame this issue as if the trial court told him that he was not entitled to discovery because he chose to exercise his right to a speedy trial. This was not the case. Instead, the trial court told defendant on numerous occasions that he was entitled to a speedy trial and to all of the discovery material in the State's possession. The court also told defendant during numerous status hearings that some discovery material took time to produce and that some of that material might not be ready if defendant insisted on going to trial immediately. The court also repeatedly advised defendant that if he wanted that discovery material, he could simply wait for it to be produced and then proceed to trial. Not only did the court give defendant this general admonishment on numerous occasions, but it also gave him this admonishment in the specific context of the lab report regarding the bullet, the roll-call rosters from the day of the incident and the physical copies of the 911 dispatch tapes from the day of the incident. Defendant was therefore clearly aware of the likely consequences of a decision to demand immediate trial, including that this evidence might not be available at trial. Each time the court admonished defendant, he indicated that he understood that some discovery material might not be ready and that he still demanded trial. In so doing, defendant knowingly and affirmatively waived his right to complain about this evidence if in fact it was not ready when trial took place. Because defendant knowingly and affirmatively made this decision, he cannot now be heard to complain that he did not receive this discovery from the State. See *People v.*

Houston, 229 Ill. 2d 1, 9 (2008) ("As this court has stated, waiver arises from an affirmative act, is consensual, and consists of an intentional relinquishment of a known right"); *People v. Major-Flisk*, 396 Ill. App. 3d 491, 500 (2010) (under the doctrine of invited error, a party cannot request to proceed in one manner and then later claim on appeal that the course of action was error or complain of error which the party induced the court to make or to which the party consented).

¶ 35 Waiver aside, we find no due process or *Brady* violations in this case because there was no undisclosed evidence and defendant has failed to show that the evidence he claims to have been denied was material. To establish a violation of *Brady* and due process, the undisclosed evidence must be both favorable to the accused and material either to defendant's guilt or punishment. *People v. Barrow*, 195 Ill. 2d 506, 534 (2001). Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *United States v. Bagley*, 473 U.S. 667, 682 (1985); *People v. Hickey*, 204 Ill. 2d 585 (2001). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Bagley*, 473 U.S. at 682. Under this standard, the defendant must show that " 'the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.' " *People v. Coleman*, 183 Ill.2d 366, 393 (1998) (quoting *Kyles v. Whitley*, 514 U.S. 419, 435 (1995)).

¶ 36 Defendant first claims that the court did not delay the trial so that the forensic scientist could prepare a report of his examination of the bullet recovered from defendant's gun. Defendant claims that the report would have shown that he did not fire the gun at the police. Defendant complains about the fact that in its written response to defendant's motion for a bill of

particulars, the State represented that it was unaware of any evidence or witnesses favorable to the defense. According to defendant, however, the "very next day" the State acknowledged the existence of a laboratory report regarding the examination of a bullet in the gun recovered from the scene. Defendant asserts that the disclosure of this report within a day of the State's representation regarding the lack of evidence favorable to defendant is "concerning enough" and that the State "failed to demonstrate any effort at due diligence" in obtaining and producing discovery material. We disagree.

¶ 37 The result of the examination of the bullet was not undisclosed evidence. Instead, a day after making its representation about the lack of evidence, the State told the court that it had just learned that morning about the examination of the bullet found in the gun, that no report had yet been prepared, and that the State would try to obtain that report by trial. Contrary to defendant's claim, these statements and the timing of the State's disclosure demonstrate an effort to immediately disclose to defendant any potentially material evidence as soon as the State was aware of its existence. Moreover, the State disclosed in the trial court that the forensic scientist would have concluded and testified that there had been no attempt to fire the gun that defendant was alleged to have possessed. This evidence was therefore not material. Defendant was not charged with discharging or attempting to discharge his firearm and the State never argued that he did so. The armed habitual criminal charge alleged that defendant possessed a firearm after having been convicted of two qualifying felonies. The aggravated assault of a police officer charge alleged that defendant pointed a firearm at someone he knew to be a police officer and that in doing so he placed the officer in reasonable apprehension of receiving a battery. The

issues at trial were whether defendant possessed a firearm and whether he pointed it at a police officer. Because defendant was not charged with firing or attempting to fire his weapon, the lab report would not have changed the result of trial even if it had been introduced as evidence.

¶ 38 Defendant argues that the lab report would have contradicted Diane Terry's testimony that defendant fired his weapon at the police and the State's characterization that defendant and the police were involved in a "shootout." However, Terry's testimony on this point did not contribute to defendant's conviction because, as discussed, defendant need not have discharged a firearm to have been found guilty. Moreover, Terry's testimony as to whether defendant fired a weapon was less than clear and her credibility on this point was contrary to and undermined by the rest of the State's evidence. Sergeant Buhrke and Officer Keel both testified that Sergeant Buhrke fired his weapon at defendant and neither testified that defendant discharged his firearm. All four of the spent casings found at the scene were from Sergeant's Buhrke's weapon. Terry was the only witness who testified that defendant fired his weapon and therefore any affect that the lab report would have had on her credibility would not have changed the outcome of the trial. Moreover, as will be more fully discussed below, the State did not argue in opening or closing statements that defendant fired his weapon at the police. The State's theory was the defendant possessed a firearm and pointed in at Sergeant Buhrke. For this reason as well, the lack of a lab report does not undermine our confidence in the jury's verdict. Notwithstanding all of the above, once this disclosure was made defendant could have called the forensic scientist to testify or asked to enter into a stipulation as to his findings, regardless of whether a report had been authored. Defendant's failure to do so waives this issue.

¶ 39 Defendant next claims that the court erred by not requiring the State to provide roll-call rosters for certain police units from the day of the incident. When asked by the trial court as to the relevance of this information, defendant stated that it might show that a "Tahoe" vehicle was assigned to Sergeant Buhrke on the day of the incident. Defendant speculated that the Tahoe was equipped with a video camera and that this was why the State switched vehicles at the scene.

¶ 40 Contrary to defendant's argument, the roll-call rosters were not undisclosed evidence and they were not material. When defendant asked for the roll-call roster, the court heard defendant's explanation as to its relevance and then told defendant that he would get that information if the State could obtain it by trial. Again, the court explained that discovery could take time and that defendant could wait for it to be produced or continue to demand trial. Defendant demanded trial. Moreover, all of the witnesses testified to a one squad car pulling up behind defendant. None of the eyewitness testified to a "Tahoe" pulling behind the Pontiac or to any other police vehicles being on the scene until after the incident occurred. The State also told the court that after speaking with detectives they were not aware of any camera footage. Defendant's entire underlying claim about the Tahoe vehicle was speculative and this type of speculation is insufficient to establish that the roll-call roster was material. See *People v. Pecoraro*, 175 Ill. 2d 294, 315 (1997) (noting that "pure speculation" is insufficient to establish a reasonable probability that the outcome of a defendant's trial would have been different).

¶ 41 Defendant next claims that he should have been given the 911 audio dispatch tapes from the date of the incident. This evidence was also disclosed to defendant and is not material. As the trial court noted, the State gave defendant transcripts of the 911 tapes. Defendant does not

dispute this and thus the substance of those tapes was disclosed and produced to him and defendant could have used any potentially exculpatory evidence from those transcripts at trial. The trial court also told defendant that the State would give him the physical tapes if it could get them by trial. Defendant does not even speculate as to what the physical copies of those tapes would have revealed that the transcripts did not. On this record, we find that defendant has failed to show that the physical tapes would have changed the outcome of trial or that their absence undermined confidence in the verdict.

¶ 42 Defendant next asserts that the court should have allowed him to argue to the jury about the lack of fingerprint or DNA evidence. The State made an oral motion *in limine* on this issue before trial and the court granted it on the basis that defendant could not demand trial before the fingerprint or DNA evidence was ready and then argue to the jury about the lack of such evidence. Rulings on motions *in limine*, like other evidentiary and discovery rulings, are committed to the trial court's discretion. *People v. Harvey*, 211 Ill.2d 368, 393 (2004). We find no abuse of discretion in the trial court's ruling on this issue. The court ordered defendant to submit to fingerprinting so the State could conduct its analysis. Defendant refused to do so and instead demanded an immediate trial. This prolonged the time it took for the State to conduct fingerprint and DNA analysis. The State later agreed with defendant that any prints recovered from the scene could be put in the crime lab's computer for comparison to the prints defendant gave when he was arrested. At this point, defendant could have waited for the DNA and fingerprint analysis to be conducted so that he could use any exculpatory evidence at trial. Defendant did not wait but instead persisted in his demand for an immediate trial. Defendant's

decision forced himself and the State to proceed to trial without this evidence. The prosecution told the court that if defendant continued to demand immediate trial, it was going to proceed to trial without any fingerprint or DNA evidence. Notably, at a hearing two days after trial, the State informed the court that it had just received a voicemail from the crime lab stating that the results from the latent prints recovered from the Pontiac and that those prints matched defendant's fingerprints. Under these circumstances, we find no abuse of discretion in the trial court's ruling to prohibit defendant from arguing about the lack of fingerprint or DNA evidence. We also find this argument with regard to the fingerprint evidence to be somewhat disingenuous. Defendant cannot complain that he was denied the right to present certain evidence or to make certain arguments when it is ultimately disclosed that this evidence is not exculpatory but is in fact inculpatory. This evidence is obviously not favorable to the accused and therefore no *Brady* violation occurred. See *Barrow*, 195 Ill. 2d at 534.

¶ 43 We also find that the trial court's ruling on the State's motion *in limine* did not prejudice defendant in light of the overwhelming evidence of his guilt. Sergeant Buhrke, Officer Keel, Angela Fisher and Robert Dishman all testified that defendant was the person who ran from the Pontiac after the police arrived. Buhrke, Keel and Dishman all testified that defendant exited the car while carrying a firearm and Dishman identified the gun recovered from the lot as the one that defendant was carrying when he ran from the car. Sergeant Buhrke and Officer Keel both saw defendant point a firearm at Sergeant Buhrke after defendant exited the vehicle. Sergeant Buhrke also testified that defendant pointed his weapon at him a second time after the sergeant chased defendant down the street. The physical evidence, such as the location of the firearm

defendant dropped and the spent casings from Sergeant Buhrke's handgun, were also consistent with the testimony of all of the witnesses except Terry's testimony that defendant fired his weapon.

¶ 44 Defendant next claims that the trial court erred by not allowing him to call "James Muhammad" as a witness. Defendant asserts that "the trial court clearly indicated that a *pro se* defendant loses the ability to locate and subpoena witnesses on his own behalf if he is incarcerated."

¶ 45 The State argues that defendant has forfeited this claim because he failed to object at trial or include the issue in his written post-trial motion. See *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (in order to preserve an issue for appeal, defendant must raise an objection at trial and include the objection in a post-trial motion). Defendant did not raise any objection at trial or include the issue in his written post-trial motions. Thus, the issue is forfeited.

¶ 46 Forfeiture aside, we find no merit to defendant's claim. The United States Supreme Court has recognized that the Constitution guarantees a criminal defendant a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986). The Constitution also confers upon a defendant the fundamental right to present witnesses in his own defense and guarantees an accused the power to subpoena witnesses. *Taylor v. Illinois*, 484 U.S. 400, 408 (1988).

¶ 47 In this case, the trial court did not infringe upon defendant's right to present a complete defense or to subpoena and call witnesses on his behalf. Defendant's claim must be viewed in context of the fact that he demanded trial despite there being outstanding discovery and that

defendant brought up this witness on the morning that his trial was to begin. Moreover, the record shows that the court did not deny defendant the right to call Muhammad as a witness. Instead, the court told defendant that the witness would likely be able to testify if defendant or his mother could get the witness to court. The court did remind defendant that he had demanded trial, that the trial was to begin at that time, that the State was ready to proceed and that the witnesses and jury were present at court. Contrary to defendant's claim, the trial court did not tell defendant that he lost the right to present witnesses because he elected to go *pro se*. Rather, the court simply reminded defendant that he had been previously admonished that getting witnesses to come to court was one of the problems with representing himself. When defendant presented his case at trial, he did not again raise the possibility of calling Muhammad as a witness or thereafter complain that the court had prohibited him from doing so.

¶ 48 Not only does the record fail to support defendant's claim that he was prohibited from calling Muhammad as a witness, but there is also no evidence to establish that Muhammad's testimony was material such that its absence warrants a new trial. To establish a violation of his Sixth Amendment right to compulsory process, a defendant "must at least make some plausible showing of how the[] testimony would have been both material and favorable to the defense." *United States v. Valenzuela-Vernal*, 458 U.S. 858, 867 (1982). Here, defendant only told the court that Muhammad had information about a "Tahoe" on the scene. He did not tell the court that Muhammad would testify that defendant was not the person who exited the Pontiac, that defendant was not armed with a gun or that he did not point that gun at Sergeant Buhrke. As set forth above, the evidence of defendant's guilt was overwhelming and Muhammad's testimony

that a Tahoe was on the scene would not have detracted from the evidence of his guilt or changed the outcome of his trial.

¶ 49 Defendant next contends that the cumulative effect of misconduct by the prosecution denied him a fair trial. He asserts that the prosecution made improper remarks during opening statements, asked improper leading questions, engaged in an improper demonstration and presented the false testimony of Diane Terry.

¶ 50 The State argues that defendant has forfeited his claim regarding improper comments by the prosecution. We agree. Although defendant raised the issue in his post-trial motion, he did not object to the comments when they were made. See *Enoch*, 122 Ill. 2d at 186-87; *People v. Wheeler*, 226 Ill. 2d 92, 122 (2007) (“To preserve claimed improper statements during closing argument for review, a defendant must object to the offending statements both at trial and in a written post-trial motion”).

¶ 51 Defendant asks that we review the issue for plain error. “[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurs and the evidence is so closely balanced that the error alone threaten[s] to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurs 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). Under plain error analysis, “it is the defendant who bears the burden of persuasion with respect to prejudice.” *People v. Woods*, 214 Ill. 2d 455, 471 (2005). Our first step is to determine whether error occurred. *Piatkowski*, 225 Ill. 2d at 565.

¶ 52 Defendant first claims that certain comments by the prosecution during opening statements were improper. "An opening statement may include a discussion of the evidence and matters that may reasonably be inferred from the evidence." *People v. Burton*, 338 Ill. App. 3d 406, 415 (2003). In an opening statement, a prosecutor may not make an argument whose only purpose is to inflame the passions of the jurors or to arouse prejudice against the defendant, without throwing any light on the issues before them. *Burton*, 338 Ill. App. 3d at 415. "The trial court has discretion to determine the proper character and scope of argument, and every reasonable presumption is indulged that such discretion was properly exercised." *People v. Cloutier*, 156 Ill.2d 438, 507 (1993). Even if improper, a prosecutor's remarks during opening will rise to the level of reversible error only if "the complained of remarks engender substantial prejudice such that the result of the trial would have been different had the comments not been made." *People v. Moore*, 358 Ill. App. 3d 683, 692 (2005).

¶ 53 Defendant first claims that the prosecution made the following improper comments at the start of its opening statement:

"It takes a certain amount of courage to be a Chicago Police Officer, especially in this country, especially in this city these days. They, like firemen, when called upon, head toward the danger. They run toward it while everybody else is running away, and on occasion they stop it before it goes any further."

Defendant asserts that this was an attempt to influence the jury's view of the evidence based on sympathy for the class of persons to which the victim belonged. It is true that "the State is not free to 'invite the jurors to enter into some sort of empathetic identification with' the victim."

People v. Woods, 341 Ill. App. 3d 599, 614 (2003), quoting *People v. Spreitzer*, 123 Ill. 2d 1, 38 (1988). However, these statements do not require reversal because they are a three-sentence anecdote in context of a nearly six-page opening statement that otherwise focused on the evidence the prosecution intended to introduce. See *Woods*, 341 Ill. App. 3d at 614 (the prosecutor's statement that the jury should place itself in the victim's shoes, while improper, was not so prejudicial as to warrant a new trial); *People v. Gonzalez*, 388 Ill. App. 3d 566, 590 (2008) (challenged remark was brief and isolated and therefore did not deny the defendant a fair trial).

¶ 54 Next, defendant complains that the prosecution falsely suggested to the jury that defendant fired his weapon when it said, "[the defendant] turns around and points the gun at Sergeant Buhrke who then fires upon this defendant because at that point he's facing a man who is pointing a loaded gun at him and *shoots at him a couple times*." (Emphasis added.) However, it is clear that when the prosecution said "and shoots at him a couple of times," it was referring to Sergeant Buhrke shooting at defendant. This conclusion is reinforced when, a few sentences later, the prosecution said, "Buhrke again fires upon the defendant, and defendant keeps running down the block." There was no error in this statement by the prosecution.

¶ 55 Defendant next claims that certain comments made by the prosecution during closing arguments were improper. The prosecution is afforded wide latitude in making closing arguments so long as the comments made are based on the evidence or reasonable inferences drawn therefrom. *People v. Williams*, 192 Ill. 2d 548, 573 (2000). When reviewing a challenge to remarks made by the prosecution during closing arguments, the comments must be considered in context of the entire closing arguments made by both parties. *People v. Wiley*, 165 Ill. 2d 259,

295 (1995). A reviewing court will not reverse a jury's verdict based upon improper remarks made during closing arguments unless the comments were of such magnitude that they resulted in substantial prejudice to defendant and constituted a material factor in his conviction. *People v. Griffin*, 368 Ill. App. 3d 369, 376 (2006).

¶ 56 First, defendant claims that the prosecution "falsely characterized the testimony of Marcus Boswell" when it said that Boswell "is a circumstantial witness but he's entirely consistent with Angela and Robert Dishman." We disagree. Boswell did testify consistently with Fisher and Dishman regarding many of events leading up to and including the police stopping behind the Pontiac, its driver fleeing from the car and then hearing gunshots. While Boswell testified that he did not know who was driving the Pontiac, as did Fisher and Dishman, and that he did not see a gun in that vehicle, as did Dishman, this only means that Boswell testified to less details than did Dishman or Fisher. What Boswell did observe, however, was consistent with the testimony of Dishman and Fisher. Thus, the prosecution's statement was a fair comment on the evidence.

¶ 57 Defendant next claims that the prosecution improperly asked the jurors to put themselves in the position of the witnesses and implied that there was an exchange of gunfire when it stated, "all of them got their hands up, looking down. Wouldn't you when there is gunplay? Wouldn't you get down?" We find no error in this comment. Initially, the prosecution did not ask the jury to place itself in the shoes of the victim, which is what happened in the cases cited by defendant, but instead asked the jurors to put themselves in the witnesses shoes. Moreover, the prosecution made this comment in order to explain to the jury why Dishman saw defendant exit the Pontiac

with a gun but why the other passengers in the car did not. When viewed in context, the prosecution was simply arguing a reasonable inference from the evidence. The prosecution's use of the word "gunplay" also did not imply that defendant fired his weapon. This was clearly a comment on the evidence, which showed that defendant exited the vehicle with a handgun that he pointed at police, that the police drew their weapons and that one of the officers fired at defendant.

¶ 58 Defendant further claims that the prosecution continued with the "gunplay theme" when it described Terry's testimony. The prosecution specifically stated, "[s]he backs away from the window, gets down, runs across the hall to her next-door neighbor. Are you kids in the house? There's gunplay out here." Again, this reference to gunplay was not an argument that defendant fired his weapon. Instead, it was a reference to the entire incident in which defendant and two police officers drew their weapons and one of the officers fired at defendant.

¶ 59 Defendant next argues that the prosecution erred when it stated that Terry's testimony was "entirely consistent with the police officers' testimony in this case, entirely consistent." We agree that Terry's testimony was not entirely consistent because, unlike the officers, she testified that defendant fired his weapon. However, this comment does not rise to the level of reversible error because, as discussed at numerous points above, the prosecution's theme of the case was that defendant possessed and pointed a gun at the police, not that he fired his weapon at them.

¶ 60 Defendant also argues that during rebuttal the prosecution again implied that defendant fired his weapon at police. The prosecution stated, "[c]itizens have the right to sit and watch TV in their own houses without fear of getting their front windows shot out. They have the right to

sit out on their front porches or walk in their own residential neighborhoods without fear of someone like [defendant] pulling up and getting into essentially what is a shootout in the middle of the block with police." Again, when viewed in context of the prosecution's entire closing argument, the reference to a "shootout" was not meant to imply that defendant fired his weapon at the police. Instead it was a fair characterization of the evidence, which showed that defendant provoked an incident in a residential neighborhood by pointing a gun at the police and causing an officer to fire his weapon at defendant.

¶ 61 Defendant next claims that the prosecution injected personal opinions about defendant's case and the evidence presented at trial. In rebuttal, the prosecution stated, "I think, frankly, ladies and gentlemen, at the time that the defendant fled Illinois and made it over to Indiana, he thought he was safe" and that "[t]he best evidence I think of the fact the Defendant was pointing a weapon at the police officer is in fact the location of his injuries."

¶ 62 Defendant's argument is based on the prosecution's use of the phrase "I think." While it is generally improper for the prosecution to express a personal opinion about a case, the prosecution may comment on the evidence presented and any reasonable inferences to be drawn therefrom. *People v. Johnson*, 114 Ill. 2d 170, 198 (1986). In *People v. Baker*, 195 Ill. App. 3d 785, 787-88 (1990), the appellate court rejected the defendant's argument that it is automatically error when a prosecutor begins a sentence with "I think" or "I believe," noting that the prosecution is allowed to comment on the evidence. In this case, the first comment by the prosecution was innocuous and further was a reasonable inference from the evidence. The prosecution was not asking the jury to draw any inferences as to defendant's guilt based upon him

being arrested in Indiana and we find nothing so prejudicial in this brief and isolated comment so as to rise to the level of reversible error. In making the second comment, the prosecution was arguing that the location of defendant's injuries was consistent with him having been shot while holding and aiming a gun at Sergeant Buhrke. The comment was therefore also a reasonable inference based on the evidence and we reject defendant's claim that the use of the phrase "I think" raises the comment to the level of reversible error. See *Baker*, 195 Ill. App. 3d at 787-88.

¶ 63 Finally, defendant claims that even if each individual prosecutorial comment does not require reversal, the cumulative effect of the improper comments does. However, where, as here, "the alleged errors do not amount to reversible error on any individual issue, there generally is no cumulative error." *Moore*, 358 Ill. App. 3d at 695. We have reviewed the opening and closing arguments in their entirety and do not find prosecutorial misconduct that rises to reversible error. We also note that the trial court admonished the jury that arguments of the attorneys were not evidence and that the jury should disregard any statement not based on the evidence. See *Gonzalez*, 388 Ill. App. 3d at 598 (trial court's instructions to the jury that closing arguments were not evidence and that the jury should disregard any statement made by the attorneys that was not based on the evidence "ameliorated any possible prejudice resulting from the prosecutor's allegedly improper remarks"). Accordingly, because we find no error in the prosecution's comments, there can be plain error and defendant has forfeited this contention regarding improper remarks by the prosecution.

¶ 64 Defendant next claims that the State asked improper leading questions. We find that defendant has waived this by failing to comply with Supreme Court Rule 341(h)(7). Supreme

Court Rule 341(h)(7) requires appellants' brief to include "[a]rgument, which shall contain the contentions of the appellant and the reasons therefor, with citation of the authorities and the pages of the record relied on." IL. S. Ct. R. 341(h)(7) (eff. July 1, 2008). "'A reviewing court is entitled to have the issues on appeal clearly defined with pertinent authority cited and a cohesive legal argument presented. The appellate court is not a depository in which the appellant may dump the burden of argument and research.'" *In re Marriage of Auriemma*, 271 Ill. App. 3d 68, 72 (1995), quoting *Thrall Manufacturing Co. v. Lindquist*, 145 Ill. App. 3d 712, 719 (1986). An issue not clearly defined and sufficiently presented fails to satisfy the requirements of Supreme Court Rule 341(h)(7) and is therefore waived. *People v. Bui*, 381 Ill. App. 3d 397, 421-22 (2008).

¶ 65 In this case, although defendant claims that the prosecution asked numerous leading questions, he gives no citations to the record in his argument section for any of these questions. Defendant's method of citing to these questions in his statement of facts is insufficient. After describing the testimony of each of the State's witnesses, defendant concludes by claiming that "throughout [that witness'] direction examination, the prosecutor asked a number of leading questions." He then provides a number of record citations without identifying any specific leading question. For example, after setting forth Sergeant Buhrke's testimony in his statement of facts, defendant claims the State asked the sergeant numerous leading questions "without objection by defendant" and then provides a list of 21 citations to the record. Not only does defendant fail to identify specific leading questions, he also offers no explanation as to how any of those questions were prejudicial to this case. Defendant's cursory argument is insufficient to

raise the issue and we therefore find it waived. See *People v. Johnson*, 192 Ill. 2d 202, 206 (2000) ("the failure to include record citations when the argument requires an examination of the record results in waiver of the issue on appeal"); *Bui*, 381 Ill. App. 3d at 421-22.

¶ 66 We also find that this claim is forfeited because, by his own admission, defendant did not object to the allegedly leading questions at the time they were asked. See *Enoch*, 122 Ill. 2d at 176. By failing to object, defendant deprived the prosecution of the chance to merely rephrase the questions.

¶ 67 Defendant also claims that the prosecution engaged in an "impermissible demonstration" by Sergeant Buhrke on the witness stand where he mimicked the Defendant's alleged pointing of a gun by using the jury box as a reference point for the perspective of the victim." We find that defendant forfeited this claim because he did not object at the time the demonstration took place. See *Enoch*, 122 Ill. 2d at 176. We also find that no error occurred. Our review of the record shows that the trial court simply asked the sergeant to demonstrate for itself and the jury the manner in which defendant held the gun. When the court asked Sergeant Buhrke where he was if defendant was running in front of him, the sergeant responded, "I'll be sitting in the jury box, he's running away from me like this (indicating), he turns and points the gun like this (indicating)." Initially, it was the court and not the prosecution that asked the sergeant to engage in this demonstration. More importantly, it is evident from the record that the demonstration was not used as an emotional invitation for the jury to step into the shoes of the victim. Instead, it was simply used as a reference point to demonstrate what occurred when defendant exited the vehicle armed with a gun. As such, we find no error.

¶ 68 Defendant next claims that the State presented the false testimony of Diane Terry.

Defendant asserts that the State indicated before trial that Terry's testimony would be consistent with Sergeant Buhcke's, that Terry later testified that defendant fired his weapon at the sergeant and that the State failed to correct this false testimony. We disagree.

¶ 69 The State's knowing use of perjured testimony to obtain a criminal conviction constitutes a violation of due process of law. *People v. Jimerson*, 166 Ill. 2d 211, 223 (1995). A witness' testimony constitutes perjury only when the witness knowingly makes a false statement. *People v. Shelton*, 401 Ill. App. 3d 564, 572 (2010). A conviction obtained by the knowing use of perjured testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the jury's verdict. *People v. Olinger*, 176 Ill. 2d 326, 345 (1997).

¶ 70 First, Terry's testimony that defendant fired his weapon was not perjury. Even a cursory examination of Terry's testimony establishes that she did not knowingly make a false statement and that instead she simply testified to what she thought she observed. Moreover, there is not a reasonable likelihood that Terry's testimony that defendant fired his weapon at the police affected the jury's verdict. As set forth above, Terry was the only witness who said defendant fired his weapon, the State was not required to prove that defendant discharged his firearm and the State's theory of the case was that defendant possessed a firearm and pointed it at the police. Therefore, we find no reversible error in the State's presentation of Terry's testimony.

¶ 71 Defendant's final contention is that his assistant public defender provided him with ineffective assistance of counsel and that the trial court therefore abused its discretion when it denied defendant's request for standby counsel. Defendant claims that the court "summarily

dismissed" his request without considering the specific factual context in which it was made. According to defendant, standby counsel should have been appointed because he was facing "serious" charges, two expert witnesses testified regarding forensic evidence and there was conflicting evidence as to defendant's guilt.

¶ 72 We initially find that defendant has waived his claim regarding the assistant public defender because he cites no authority stating that the conduct of defendant's initial counsel has a bearing on whether standby counsel should be appointed. See IL. S. Ct. R. 341(h)(7) (eff. July 1, 2008). Moreover, to prevail on a claim of ineffective assistance of counsel, defendant must show that (1) counsel's representation fell below an objective standard of reasonableness, and that (2) counsel's deficient performance so prejudiced defendant as to deny him a fair trial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). In this case, defendant cannot establish that he was prejudiced. Defendant claims that the assistant public defender "took no affirmative steps to request discovery or preserve any evidence." However, defendant discharged the Public Defender's office and elected to represent himself very early in the proceedings when discovery had just begun. Defendant thereafter had the opportunity to request any discovery that he wanted and the record shows that defendant did in fact do so and that he engaged in extensive discovery. Defendant does not point to any evidence that was not preserved or that he was unable to obtain as a result of the Public Defender's brief representation of him. Accordingly, defendant has not shown that he was prejudiced by the representation provided by the Public Defender's office and his claim of ineffective assistance of counsel is without merit. See *People v. Palmer*, 162 Ill. 2d 465, 476 (1994) (the failure to make the requisite showing of either deficient performance or

sufficient prejudice defeats the ineffective assistance of counsel claim).

¶ 73 We reach the same conclusion with respect to defendant's claim that he should have been appointed standby counsel. A trial court may appoint standby counsel to assist a defendant despite the defendant's decision to proceed *pro se*, but a defendant who decides to represent himself must be prepared to do so. *People v. Williams*, 277 Ill. App. 3d 1053, 1058, (1996). Relevant criteria in deciding whether to appoint standby counsel to assist a *pro se* defendant include: "the nature and gravity of the charge, the expected factual and legal complexity of the proceedings, and the abilities and experience of the defendant." *People v. Gibson*, 136 Ill. 2d 362, 380 (1990). The trial court has broad discretion in deciding whether to appoint standby counsel. *People v. Redmond*, 265 Ill. App. 3d 292, 304 (1994).

¶ 74 Initially, we reject defendant's assertion that the trial court "summarily dismissed" his request for standby counsel. The record makes clear that the trial court was aware that it had discretion to appoint standby counsel and that it exercised that discretion in denying defendant's request. A trial court is not required to recite all of the relevant factors on the record because the court is presumed to know the law and apply it properly. See *People v. Phillips*, 392 Ill. App. 3d 243, 265 (2009) (relying upon this principle when finding that the trial court did not abuse its discretion by refusing to appoint standby counsel to assist the *pro se* defendant even though the court did not recite the relevant factors on the record). There is nothing in the record to rebut this presumption and, to the contrary, a review of the record shows that the court was aware of defendant's ability and experience, the nature of the charges against defendant and the complexity of the case.

¶ 75 Additionally, we find no abuse of discretion in the court's denial of defendant's request for standby counsel. When defendant told the court that he wished to fire the public defender and represent himself, the court was careful to thoroughly admonish defendant about the risks of doing so. The court also told defendant that it had discretion to appoint standby counsel but that it would not do so. The court observed that it was "not a complicated case" and that although there were a number of charges, they were all "basically the same indictment." Defendant stated that he understood and reiterated his desire to represent himself. At a subsequent hearing, the court reiterated the sentencing range defendant could face and again asked, "are you sure you want to go *pro se*?" Defendant stated that he understood and asked for standby counsel to aid in selecting the jury. The court told defendant that it would not appoint standby counsel and gave him the choice of being represented by a court-appointed public defender or representing himself. Defendant chose to represent himself.

¶ 76 Further, the trial court was correct when it observed that all of the charges against defendant were essentially the same incident. Defendant's case was factually simple and the issues at trial were not complex. The primary issues at trial were whether defendant was in possession of a firearm and whether he pointed it at a police officer. Although two expert witnesses testified regarding forensic evidence, that testimony was straightforward and did not go to the issues that were contested or in dispute at trial.

¶ 77 The court was also aware that defendant progressed to "10th grade GED" in school and that defendant had never before represented himself or otherwise had legal training. On the other hand, defendant was 45 years old at the time of trial and had some experience with the criminal

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justice system based upon his prior convictions. The trial court considered all of these factors and ultimately denied defendant's request for standby counsel. Under these circumstances, we cannot say that the trial court's ruling was an abuse of discretion. See *Phillips*, 392 Ill. App. 3d at 265-66 (finding no abuse of discretion in the trial court's denial of the defendant's request for standby counsel where the defendant was charged with aggravated battery of a police officer, where neither the law nor the facts were complex and no expert testimony or scientific evidence was required, and where the defendant was a 41 year old adult who had experience with the criminal justice system).

¶ 78 For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

¶ 79 Affirmed.