

No. 1-11-2272

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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS,)	
)	Appeal from the
)	Circuit Court of
Plaintiff-Appellee,)	Cook County.
)	
v.)	No. 10 CR 11167
)	
MAURICE WILSON,)	Honorable
)	Joseph M. Claps,
Defendant-Appellant.)	Judge Presiding.
)	

JUSTICE GORDON delivered the judgment of the court.
Presiding Justice Lampkin and Justice Hall concurred in the judgment.

ORDER

- ¶ 1 *Held:* Defendant’s conviction is affirmed where: (1) most of the State’s remarks during closing argument were proper and, to the extent that any comments were improper, the comments did not rise to the level of plain error; (2) the trial court’s instruction to the jury to continue deliberating after receiving a note that a juror was wavering and wanted to return home was not coercive or improper; and (3) defendant’s trial counsel was not ineffective in her examination of a State witness, or in her failure to object to the trial court’s instruction to the jury to continue deliberating, or in her failure to recall the number of peremptory challenges used while arguing defendant’s motion for a new trial.
- ¶ 2 After a jury trial, defendant Maurice Wilson was convicted of two counts of unlawful use

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of a weapon by a felon and was sentenced to five years in the Illinois Department of Corrections for each count, to be served concurrently. On appeal, defendant argues that he is entitled to a new trial because (1) the prosecutor made several improper comments during closing argument and (2) the jury's verdict was hastened when the trial court instructed the jury to continue deliberating at 9 p.m., after a juror had indicated that he was wavering and wanted to return home. In his supplemental brief, defendant argues that he is also entitled to a new trial because trial counsel was ineffective (1) in failing to impeach a witness' testimony with the witness' inconsistent preliminary hearing testimony; (2) in failing to object to the trial court's instruction to the jury to continue deliberating; and (3) in failing to accurately recall the number of peremptory challenges used. For the reasons that follow, we affirm.

¶ 3

BACKGROUND

¶ 4 Defendant was charged with two counts of unlawful use of a weapon by a felon: one for possession of a handgun and one for possession of ammunition.

¶ 5

I. Preliminary Hearing

¶ 6 On June 14, 2010, Chicago Police Officer Dennis Huberts testified at defendant's preliminary hearing that he was on duty at 4:25 a.m. on June 6, 2010, and responded to a noise disturbance call at 8919 South Parnell Avenue. Huberts identified defendant in court as someone who was present at the scene, and testified that, while in his vehicle, he observed defendant grab his waistband, turn, and flee toward the rear of the location. Huberts pursued defendant by foot and, when defendant arrived at the rear of the location, defendant dropped a revolver from his right hand; Huberts testified that the gun was a "chrome nickle I believe it was a Rhome 38

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caliber revolver.” The weapon was approximately 10 feet from defendant when Huberts first observed it. Huberts testified that he recovered the weapon and determined that it was loaded.

¶ 7 On cross-examination, Huberts testified that it was dark at the time. He first observed defendant when Huberts was inside his moving vehicle and did not observe any weapon, nor did he observe the weapon when defendant turned and fled. Huberts testified that defendant had dropped the weapon and attempted to climb a fence, where Huberts was able to apprehend him. Huberts testified that at one point, he, defendant, and another individual were in the yard.

¶ 8 II. Trial

¶ 9 Defendant’s trial was conducted on May 17, 2011. The State presented two witnesses: Officer Dennis Huberts and Officer Sean Carroll, both of the Chicago police department, as well as photographs of the scene; and the gun and ammunition recovered. The defense did not present any evidence other than photographs of the scene. The parties also stipulated that defendant had been previously convicted of a felony in the past 10 years.

¶ 10 A. Jury Selection

¶ 11 During jury selection, venireperson V.L.¹, who was among the initial group of 20 venirepeople questioned, was asked whether she had ever been an accused, a complainant, or a witness in a criminal case, and responded “I don’t know.” Later, when discussing whether any of the venire in the initial group should be excused for cause, defense counsel requested that V.L. be excused for cause, stating that “she seemed to be very confused with [the trial court’s] questioning.” The trial court responded that it did not believe she was confused, but brought

¹ For the sake of the juror’s privacy, we refer to her by her initials.

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V.L. back to chambers for additional questioning. V.L. testified that she did not understand the question about whether she had been an accused, a complainant, or a witness. The trial court explained the question again and asked V.L. whether “any of that appl[ied] to” her. V.L. responded, “I don’t think so.” The trial court denied defense counsel’s request to excuse V.L. for cause. Defense counsel did not use a peremptory challenge against V.L.; defense counsel used four peremptory challenges against the venire in the initial group of 20, two peremptory challenges against the venire in the next group of 15, and the remaining peremptory challenge against a venireperson in the final group of five.

¶ 12 B. Officer Dennis Huberts

¶ 13 The State’s first witness was Officer Dennis Huberts of the Chicago police department, who testified that, on June 6, 2010, he was working the midnight shift with Officer Sean Carroll. They were driving a marked police vehicle and were wearing civilian attire with police vests. At approximately 4:21 a.m., they responded to a call on the radio concerning a noise disturbance. Huberts drove the vehicle eastbound on 89th Street and turned south onto Parnell Avenue, a one-way street in a residential area that was lit by streetlights.

¶ 14 Huberts testified that, as he turned onto Parnell, he observed a group of approximately 10 males immediately outside the open front gate of a residence; a single-bulb lamp was located inside the residence’s fence and was illuminated. Huberts identified defendant in court as one of the individuals present within the group. Huberts arrived at the residence and opened the vehicle door; he was approximately 10 feet from defendant. Huberts observed defendant looking in the direction of the vehicle; defendant dropped the drink he was holding, grabbed his waistband, and

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ran towards the rear of the residence; another man, standing directly beside defendant, also ran in the same direction. When defendant and the other man ran, Huberts pursued them on foot. The other members of the group remained where they were and did not leave.

¶ 15 Huberts testified that defendant and the other man ran down the gangway on the side of the residence to the residence's fenced-in back yard. When defendant turned the corner to enter the gangway, he extended his arm backwards and brandished what appeared to be a chrome handgun. The other man was in front of defendant and Huberts was directly behind defendant, approximately five to six feet away. When defendant reached the middle of the yard, he dropped the handgun into the grass, then turned and attempted to jump over the chain-link fence towards the alley behind the residence. Huberts caught up to defendant and performed a "take down," where he grabbed defendant and placed him on the ground; approximately 10 to 14 seconds had passed between the time defendant began running and the time Huberts detained him. Huberts did not have his handcuffs, so he waited for Carroll to arrive. When Huberts detained defendant, they were approximately 10 feet from the handgun.

¶ 16 Huberts testified that after he detained defendant, he used the radio on his belt to provide a description of the other man who had been running with defendant; the other man had been able to jump over the fence, ran southbound down the alley, then turned eastbound into another yard. Huberts did not observe the other man discard anything and kept sight of him from the time he began running into the backyard with defendant until after he ran into the alley, which was lighted. While Huberts was radioing the description of the other man, Carroll arrived from the front of the residence and stepped over the handgun. Carroll assisted Huberts in handcuffing

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defendant and they picked up the handgun; Carroll recovered the gun first. At that time, Huberts was able to take a closer look at the gun, which he described as a chrome revolver with a pearl grip handle and loaded with six live-round bullets.

¶ 17 Huberts testified that, when he detained defendant, he did not have the handcuffs that were normally on his belt because they had fallen off when he was exiting the vehicle; he later discovered them on the floorboard of the vehicle.

¶ 18 On cross-examination, Huberts testified that, prior to their shift, he and Carroll had spoken and determined that Huberts would be the “runner,” meaning that, in the event that Huberts exited the vehicle and ran, Carroll was to move to the driver’s seat and drive in the direction in which Huberts was running. Huberts further testified that the area was “well lit” from ambient lights in the area, including the light inside the residence’s yard; Huberts admitted that there were no streetlights in the photographs of the residence admitted as State’s exhibits. Hubert testified that he completed a police report of the incident, which did not include the fact that, prior to dropping the gun, defendant brandished it and ran through the gangway into the yard; the police report did include the fact that defendant dropped the gun.

¶ 19 Huberts testified that Carroll did not use gloves or a cloth to pick the gun up and that the gun was not submitted for fingerprint or DNA testing.

¶ 20 C. Officer Sean Carroll

¶ 21 The State’s second witness was Officer Sean Carroll of the Chicago police department, who testified that at approximately 4:20 a.m. on June 6, 2010, he and Huberts responded to a noise disturbance call at a residence at 89th and Parnell. As their vehicle approached the address,

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Carroll observed a group of 8 to 10 males standing in front of the residence. Huberts parked the vehicle and opened the door to exit, and Carroll prepared to exit the vehicle as well. As Carroll exited the vehicle, he observed Huberts begin to pursue two men from the group who had begun running; the remaining individuals remained where they were. Carroll observed the two men running down the gangway next to the residence to the rear of the residence; Huberts was chasing the men.

¶ 22 Carroll testified that he ran to the other side of the vehicle to sit in the driver's seat and drove the vehicle south down Parnell towards 90th Street; Carroll was in constant radio contact with Huberts. Carroll turned onto 90th Street, then drove to the alley behind the residence. Carroll observed a chain-link fence with a gate separating the backyard of the residence from the alley and observed Huberts and one of the men in the backyard; Carroll was not able to identify defendant in court as the man in the backyard but testified that "[a]ctually I don't observe the individual here in the courtroom." Carroll testified that Huberts was on top of the man "like detaining him."

¶ 23 Carroll testified that he was not able to access the backyard from the alley, so he drove the vehicle back to the front of the residence and went down the gangway to the backyard, using his flashlight, to assist Huberts. When he returned to the front of the residence, the other individuals were no longer in front. As Carroll entered the backyard from the gangway, he observed a shiny object, which he later discovered to be a gun, in the grass approximately 10 feet from Huberts and the man. He did not recover the gun at that time but proceeded to where Huberts was detaining the man. Carroll spoke with Huberts and established that Huberts was

aware of the gun's location. Once the man was handcuffed, Carroll returned to recover the gun.

¶ 24

D. Closing Arguments

¶ 25 After the trial court denied the defense's motion for a directed finding and the defense rested, the parties presented their closing arguments. During the State's closing, the following colloquy occurred:

“PROSECUTOR: [I]t's the State's position that Officer Carroll testified very credibly. He was honest when he got up on the stand and he told you what happened. And he told you he couldn't tell you if the defendant or the person that Officer Huberts had in custody was the defendant sitting at the defense table.

DEFENSE COUNSEL: Objection, that wasn't the evidence.

THE COURT: Ladies and gentlemen, you heard the evidence for you to determine what the evidence is. As I told you, nothing the attorneys ever say is evidence. If their argument is not supported by the evidence, you are to reject it.

Go ahead.

PROSECUTOR: That's a truth detector, folks. If that police officer was going to come in here and lie to you, he would have identified the defendant. It's credible that he wasn't the one that chased the defendant. He wasn't the one that detained the

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defendant. All of that was done by Officer Huberts who clearly identified this defendant.”

¶ 26 During its closing, the defense focused on inconsistencies in the officers’ testimony, noting:

“Ladies and gentlemen, the State gets to come up before you and argue again, but they’re not going to be able to bring you any new evidence. They’re not going to be able to stand up here and say that there’s anything else to prove that it was Maurice Wilson. All they have is the inconsistent, incredible and unbelievable testimony of Officer Huberts.”

¶ 27 During rebuttal, the prosecutor stated:

“Now, the defense wants you to -- the defense wants to say that the officers got up there and testified inconsistent with one another. She can say it all she wants. You heard the testimony and you can weigh the credibility of the officers and decide if they were inconsistent. There were no inconsistencies, ladies and gentlemen.

These officers are risking their lives everyday on the job to try and get the guns off the streets, to try and keep the citizens of Chicago safe. Most of these people turn to the police officers for help, for safety. The defendant, when he sees the police officers,

runs.”

The prosecutor continued:

“Ladies and gentlemen, make no mistake about it. The defense wants you to believe that these officers are risking their years on the police force to take that witness stand and lie to you, that they’re risking their career to get up there and tell a lie and say that this guy had a gun. Why? Why would they do that?”

¶ 28 E. Jury Deliberations

¶ 29 The jury began deliberating at 6:05 p.m. During the course of jury deliberations, the jury sent three notes to the trial court.

¶ 30 The first note, sent at 7:20 p.m., contained two requests. The first stated: “We want [a] transcript of Officer Carroll’s testimony.” The second stated: “Police report — are we able to get a copy of the police report?” The trial court’s response to the first request was that “[i]t’s being typed and will be delivered,” and the response to the second request was “[n]o — police reports are not evidence.”

¶ 31 At 8:30 p.m., the jury sent a second note, asking: “What do we do if we can’t come to an agreement?” In response, the parties and the trial court engaged in the following colloquy:

“THE COURT: [S]ince they’ve been deliberating for two and a half hours which is longer than the trial, do you want me to bring them out and ask them if they believe they’re deadlocked?

DEFENSE COUNSEL: Well, keep deliberating.

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THE COURT: I'm sorry?

DEFENSE COUNSEL: Keep deliberating.

THE COURT: I'm sorry?

DEFENSE COUNSEL: Keep deliberating.

THE COURT: It's 8:40. How long do you think I'm going to let them deliberate?

DEFENSE COUNSEL: I don't know, Judge. Or Prim them.

THE COURT: I'm not going to do that. How long do you think I'm going to let them deliberate?

DEFENSE COUNSEL: I wouldn't even try to guess what you would do.

PROSECUTOR: Answer, keep deliberating.

THE COURT: What do you think?

DEFENSE COUNSEL: We would like them to keep deliberating.

THE COURT: 'Ladies and gentlemen of the jury, continue to deliberate.'

I can tell you right now that by 9:15 if they don't have a verdict, I'm going to call them out and ask them -- ask the foreperson and see where we go.

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DEFENSE COUNSEL: Okay.

THE COURT: I can send them home and let them come back tomorrow or hang. It's a pretty straightforward case.

DEFENSE COUNSEL: Come back tomorrow.

PROSECUTOR: That's my preference.

DEFENSE COUNSEL: That's my, of the two, that's my preference.

THE COURT: I'm telling you what my options are. This isn't a democracy. Stick around."

The trial court's response to the jury read: "Ladies and gentlemen of the jury[,] continue to deliberate!"

¶ 32 At approximately 9 p.m., the jury sent a third note that read: "One of the jurors is waivering [*sic*] so he can go home. Can we get an alternate?" Lower on the same page was another question: "Can we get testimony of Officer Hubert[s]? Specifically the discussion about the police report?" Both the State and defense counsel agreed that Hubert's testimony should be provided to the jury. The trial court responded: "Okay. Well, I will do that, but it's way too late to do that tonight. So I'm going to see what the foreperson says and then I'll send them back and I'll ask you."

¶ 33 The jury was brought out, and the trial court asked the foreperson, "if I allow the jury to deliberate any more tonight, do you think it would prove fruitful? And that's just a yes or no." The foreperson replied, "Yes." The court responded:

“All right. I’ll -- here’s the answer to the first question:

The alternates are not available. And the transcript would not be available tonight, at least not in the amount of time that I’m going to allow you to deliberate tonight. So it’s just not feasible.

So go back. And if I don’t hear from you, I’ll call you out in a little bit.”

¶ 34 At 9:45 p.m., the jury reached a verdict, finding defendant guilty of unlawful use of a weapon by a felon for his possession of both the firearm and the ammunition, and the trial court entered judgment on the verdict.

¶ 35 III. Posttrial Proceedings

¶ 36 On June 9, 2011, defendant filed a motion for a new trial. On July 19, 2011, the matter came before the trial court for a hearing. With respect to defense counsel’s claim that the trial court should have granted her request to remove several of the jurors for cause, defense counsel and the trial court engaged in the following colloquy:

“THE COURT: How many of your seven challenges did you use?

DEFENSE COUNSEL: I think I used all of them, Judge.

THE COURT: I looked at my notes. For some strange reason, I don’t have that recorded. *** I just wondered if you used them all or not.

DEFENSE COUNSEL: I believe I used six.

THE COURT: Out of seven?

DEFENSE COUNSEL: Yes, I have six.

THE COURT: So don't you waive all your objections to jury selection because of denial of cause if you don't use all seven? Isn't that the rule?

DEFENSE COUNSEL: I'm not sure, Judge, but my argument is -- if that is the rule, I guess I have no argument."

The trial court denied the motion for a new trial and, after hearing arguments in aggravation and mitigation, sentenced defendant to five years in the Illinois Department of Corrections for each count, to be served concurrently. Trial counsel filed a motion to reconsider the sentence, which was denied, and this appeal follows.

¶ 37

ANALYSIS

¶ 38 On appeal, defendant argues that he is entitled to a new trial because (1) the prosecutor made several improper comments during closing argument; (2) the jury's verdict was hastened when the trial court instructed the jury to continue deliberating at 9 p.m., after a juror had indicated that he was wavering and wanted to return home; and (3) trial counsel was ineffective. We consider each argument in turn.

¶ 39

I. Prosecutor's Statements During Closing Argument

¶ 40 Defendant first argues that, during closing argument, the State "improperly vouched for the credibility of their witnesses based on the fact that they were police officers and would not risk their careers to lie on the stand in this case." Defendant claims that, due to the prosecutor's

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improper comments, defendant was denied a fair trial, warranting reversal and a new trial. It is not clear whether this issue is reviewed *de novo* or for abuse of discretion. We have previously made this same observation in several cases, including *People v. Land*, 2011 IL App (1st) 101048, ¶¶ 149-51, *People v. Phillips*, 392 Ill. App. 3d 243, 274-75 (2009), and *People v. Johnson*, 385 Ill. App. 3d 585, 603 (2008). The Second District Appellate Court has agreed with our observation that the standard of review for closing remarks is an unsettled issue. *People v. Burman*, 2013 IL App (2d) 110807, ¶ 26; *People v. Robinson*, 391 Ill. App. 3d 822, 839-40 (2009).

¶ 41 The confusion stems from an apparent conflict between two supreme court cases: *People v. Wheeler*, 226 Ill. 2d 92, 121 (2007), and *People v. Blue*, 189 Ill. 2d 99, 128, 132 (2000). In *Wheeler*, our supreme court held that “[w]hether statements made by a prosecutor at closing argument were so egregious that they warrant a new trial is a legal issue this court reviews *de novo*.” *Wheeler*, 226 Ill. 2d at 121. However, the supreme court in *Wheeler* cited with approval *Blue*, in which the supreme court had previously applied an abuse of discretion standard. *Wheeler*, 226 Ill. 2d at 121. In *Blue* and numerous other cases, our supreme court had held that the substance and style of closing arguments is within the trial court’s discretion and will not be reversed absent an abuse of discretion. *Blue*, 189 Ill. 2d at 128, 132; *People v. Caffey*, 205 Ill. 2d 52, 128 (2001); *People v. Emerson*, 189 Ill. 2d 436, 488 (2000); *People v. Williams*, 192 Ill. 2d 548, 583 (2000); *People v. Armstrong*, 183 Ill. 2d 130, 145 (1998); *People v. Byron*, 164 Ill. 2d 279, 295 (1995). Our supreme court had reasoned that “[b]ecause the trial court is in a better position than a reviewing court to determine the prejudicial effect of any remarks, the scope of

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closing argument is within the trial court's discretion." *People v. Hudson*, 157 Ill. 2d 401, 441 (1993). Following *Blue* and other supreme court cases like it, this court had consistently applied an abuse of discretion standard. *People v. Tolliver*, 347 Ill. App. 3d 203, 224 (2004); *People v. Abadia*, 328 Ill. App. 3d 669, 678 (2001).

¶ 42 Since *Wheeler*, appellate courts have been divided regarding the appropriate standard of review. The second and third divisions of the First District have applied an abuse of discretion standard, while the Third and Fourth Districts and the fifth division of the First District have applied a *de novo* standard of review. Compare *People v. Love*, 377 Ill. App. 3d 306, 313 (1st Dist. 2d Div. 2007), and *People v. Averett*, 381 Ill. App. 3d 1001, 1007 (1st Dist. 3d Div. 2008), with *People v. McCoy*, 378 Ill. App. 3d 954, 964 (3d Dist. 2008), *People v. Palmer*, 382 Ill. App. 3d 1151, 1160 (4th Dist. 2008), and *People v. Ramos*, 396 Ill. App. 3d 869, 874 (1st Dist. 5th Div. 2009).

¶ 43 However, we do not need to resolve the issue of the appropriate standard of review at this time, because our holding in this case would be the same under either standard. This is the same approach that we took in both *Phillips* and *Johnson*, and was the same approach taken by the Second District in its *Robinson* and *Burman* opinions. *Phillips*, 392 Ill. App. 3d at 275; *Johnson*, 385 Ill. App. 3d at 603; *Robinson*, 391 Ill. App. 3d at 840; *Burman*, 2013 IL App (2d) 110807, ¶ 26. As such, we turn to the merits of defendant's argument.

¶ 44 As an initial matter, the State claims that defendant's argument has been forfeited because he failed to object at trial or to raise the issue in his posttrial motion. Illinois law is clear that both an objection and a written posttrial motion raising an issue are necessary to preserve an error

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for appellate review. *People v. Enoch*, 122 Ill. 2d 176, 186 (1988) (“Both a trial objection and a written post-trial motion raising the issue are required for alleged errors that could have been raised during trial.” (Emphases in original.)). In the case at bar, defendant objected to the prosecutor’s statement that Carroll testified credibly but did not object to any of the prosecutor’s other comments. Additionally, defendant raised the issue of the State’s closing argument in his posttrial motion and argued it during the hearing on the motion without objection by the State. Accordingly, defendant preserved the issue concerning the State’s comment that Carroll testified credibly but did not preserve any alleged errors relating to the other comments. Nevertheless, defendant asks us to consider any issues not properly preserved for plain error.

¶ 45 “[T]he plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant’s trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.” *People v. Piatkowski*, 225 Ill. 2d 551, 565 (2007). In a plain error analysis, “it is the defendant who bears the burden of persuasion.” *People v. Woods*, 214 Ill. 2d 455, 471 (2005). However, in order to find plain error, we must first find that the trial court committed some error. *Piatkowski*, 225 Ill. 2d at 565 (“the first step is to determine whether error occurred”). Thus, we consider all of the State’s challenged comments to determine whether error occurred.

¶ 46 A State’s closing will lead to reversal only if the prosecutor’s improper remarks created

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“substantial prejudice.” *Wheeler*, 226 Ill. 2d at 123, *People v. Johnson*, 208 Ill. 2d 53, 64 (2003); *People v. Easley*, 148 Ill. 2d 281, 332 (1992) (“The remarks by the prosecutor, while improper, do not amount to substantial prejudice”). Substantial prejudice occurs “if the improper remarks constituted a material factor in a defendant’s conviction.” *Wheeler*, 226 Ill. 2d at 123 (citing *People v. Linscott*, 142 Ill. 2d 22, 28 (1991)).

¶ 47 When reviewing claims of prosecutorial misconduct in closing argument, a reviewing court will consider the entire closing arguments of both the prosecutor and the defense attorney, in order to place the remarks in context. *Wheeler*, 226 Ill. 2d at 122; *Johnson*, 208 Ill. 2d at 113; *People v. Tolliver*, 347 Ill. App. 3d 203, 224 (2004). Prosecutors are afforded a great deal of latitude in closing argument. *Wheeler*, 226 Ill. 2d at 123; *Blue*, 189 Ill. 2d at 127. Prosecutors may comment on the evidence and draw reasonable inferences therefrom, as well as dwelling on the “ ‘evil results of crime’ ” and urging the “ ‘fearless administration of the law.’ ” *People v. Liner*, 356 Ill. App. 3d 284, 295-96, 297 (2005) (quoting *People v. Harris*, 129 Ill. 2d 123, 159 (1989)). However, a prosecutor may not make an argument that serves no purpose but to inflame the jury. *Blue*, 189 Ill. 2d at 128 (citing *People v. Tiller*, 94 Ill. 2d 303, 321 (1982)).

¶ 48 In the case at bar, defendant takes issue with three of the State’s comments. First, during closing argument, the prosecutor stated:

“[I]t’s the State’s position that Officer Carroll testified very credibly. He was honest when he got up on the stand and he told you what happened. And he told you he couldn’t tell you if the defendant or the person that Officer Huberts had in custody was the

defendant sitting at the defense table.

* * *

That's a truth detector, folks. If that police officer was going to come in here and lie to you, he would have identified the defendant. It's credible that he wasn't the one that chased the defendant. He wasn't the one that detained the defendant. All of that was done by Officer Huberts who clearly identified this defendant."

Defendant argues that with this statement, the prosecutor "expressed her personal belief that the two State's witnesses, the only witnesses at trial, Officer Huberts and Officer Carroll[,], testified honestly." We do not find this argument persuasive.

¶ 49 "In closing, the prosecutor may comment on the evidence and any fair, reasonable inferences it yields [citation], even if such inferences reflect negatively on the defendant [citation]." *People v. Nicholas*, 218 Ill. 2d 104, 121 (2006). In the case at bar, the prosecutor was pointing to Officer Carroll's testimony that he was unable to identify defendant in court to support his credibility as a witness. "While it is improper for the State to place the integrity of the State's Attorney's office behind the credibility of a witness, the State may discuss the witnesses and their credibility and is entitled to assume the truth of the State's evidence." *People v. Pryor*, 170 Ill. App. 3d 262, 273 (1988) (citing *People v. Redman*, 141 Ill. App. 3d 691, 702 (1986)). Here, despite defendant's contention to the contrary, the State was not expressing a personal belief but merely commenting on the evidence. Furthermore, to the extent that the use

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of the phrase “it’s the State’s position” that Carroll testified credibly could be construed as expressing a personal belief, any error is harmless, given the prosecutor’s immediate focus on the content of Carroll’s testimony to support the argument as to his credibility.

¶ 50 We find defendant’s comparison of his case to that of *People v. Lee*, 229 Ill. App. 3d 254 (1992), to be unpersuasive. In *Lee*, the prosecutor stated that a police officer witness was “‘extremely honest in my humble opinion.’” *Lee*, 229 Ill. App. 3d at 260. The appellate court found the statement to constitute reversible error, finding that “[b]ecause that comment was the prosecutor’s personal belief in the witness’s credibility, it was improper and prejudicial.” *Lee*, 229 Ill. App. 3d at 260. In the case at bar, there was no such statement by the prosecutor. At most, the prosecutor indicated that it was “the State’s position” that Carroll was credible. Such a statement is a far cry from the explicitly personal belief expressed in *Lee* and, as noted, the prosecutor immediately tied the statement as to Carroll’s credibility to the evidence at trial. Accordingly, we find no error in the State’s closing argument.

¶ 51 Next, we consider the two statements that defendant did not properly preserve for review to determine if error exists. During rebuttal, the prosecutor argued:

“These officers are risking their lives everyday on the job to try and get the guns off the streets, to try and keep the citizens of Chicago safe. Most of these people turn to the police officers for help, for safety. The defendant, when he sees the police officers, runs.”

Defendant argues that this statement was improper because the State “emphasized that their

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witnesses are upstanding citizens, risking their lives for the members of the jury.” However, defendant focuses only on the first part of the remark — that “[t]hese officers are risking their lives everyday on the job *** to try and keep the citizens of Chicago safe” — and not on the last part of the remark — that, while most people ran to the police for help, “defendant, when he sees the police officers, runs.” From the context of the statement, it is apparent that it is a comment on defendant’s actions in running from the police, contrasted with the average citizen’s “turn[ing] to the police officers for help, for safety.” Commenting on defendant’s actions is a proper subject for closing argument. See *Nicholas*, 218 Ill. 2d at 121 (“In closing, the prosecutor may comment on the evidence and any fair, reasonable inferences it yields [citation], even if such inferences reflect negatively on the defendant [citation].”).

¶ 52 Additionally, as the State notes, the prosecutor’s statement that “[t]hese officers are risking their lives everyday on the job” was based on the evidence. In the case at bar, Huberts testified that he was pursuing an armed man who had a handgun pointed behind him. Such actions could certainly be characterized as Officers Huberts and Carroll “risking their lives *** on the job.” Consequently, we cannot find the statement improper. Since no error exists, there can be no plain error. Furthermore, if we found the prosecutor’s comments improper, it still would not rise to the level of plain error because we cannot find that statement to be prejudicial to defendant in this case.

¶ 53 Finally, the prosecutor stated:

“Ladies and gentlemen, make no mistake about it. The defense wants you to believe that these officers are risking their

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years on the police force to take that witness stand and lie to you, that they're risking their career to get up there and tell a lie and say that this guy had a gun. Why? Why would they do that?"

We agree with defendant that those comments are improper. Our Illinois Supreme Court has recently found such comments improper, finding that they "were impermissible speculation, as no evidence was introduced at trial from which it could be inferred that the testifying officers would risk their careers if they testified falsely." *People v. Adams*, 2012 IL 111168, ¶ 20.

Furthermore, the court noted that "[b]y invoking unspecified, but assumed, punitive consequences or sanctions that might result if a police officer testifies falsely, a prosecutor's arguments imply that a police officer has a greater reason to testify truthfully than any other witness with a different type of job, thus violating the principle that a prosecutor may not argue that a witness is more credible because of his status as a police officer." (Internal citations and quotation marks omitted.) *Adams*, 2012 IL 111168, ¶ 20.

¶ 54 However, despite the comments' improper nature, we cannot find that their use rises to the level of plain error. As in *Adams*, the prosecutor's comments in the case at bar "though improper, were not of a sort to inflame the passions of the jury." *Adams*, 2012 IL 111168, ¶ 23.

We also note that, immediately prior to closing argument, the trial court cautioned the jury that "[w]hat they attorneys say during arguments in this case, during their opening statement or actually any time they speak is not evidence and it's never evidence. The only evidence comes from the witnesses and the stipulations and the reasonable inferences from that evidence." When defense counsel objected to the State's closing argument, the trial court repeated: "nothing the

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attorneys ever say is evidence. If their argument is not supported by the evidence, you are to reject it.” Finally, after closing arguments, the trial court repeated for a third time that arguments of the attorneys were not evidence and that any statement not based on the evidence should be disregarded. Thus, the jury was cautioned several times and we cannot say that “the error alone threatened to tip the scales of justice against the defendant” (*Piatowski*, 225 Ill. 2d at 565), nor was it “so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process” (*Piatowski*, 225 Ill. 2d at 565). See also *Adams*, 2012 IL 111168, ¶ 23 (in finding no plain error, pointing to the fact that the jury was properly instructed that counsel’s arguments were not evidence and that the jury was to judge witness credibility); *Nichols*, 218 Ill. 2d at 122-23 (noting that the jury was cautioned before closing arguments and in the jury instructions).

¶ 55

II. Hastening of Jury Verdict

¶ 56 Defendant’s second argument on appeal is that the jury’s verdict was hastened by the trial court’s instruction to the jury to continue deliberating upon receiving the jury’s third note. In order to properly consider defendant’s argument, it is helpful to recount the events surrounding jury deliberations.

¶ 57 The jury began deliberating at 6:05 p.m. During the course of jury deliberations, the jury sent three notes to the trial court. The first note, sent at 7:20 p.m., contained two requests. The first stated: “We want [a] transcript of Officer Carroll’s testimony.” The second stated: “Police report — are we able to get a copy of the police report?” The trial court’s response to the first request was that “[i]t’s being typed and will be delivered,” and the response to the second request

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was “[n]o — police reports are not evidence.”

¶ 58 At 8:30 p.m., the jury sent a second note, asking: “What do we do if we can’t come to an agreement?” In response, the parties and the trial court engaged in the following colloquy:

“THE COURT: [S]ince they’ve been deliberating for two and a half hours which is longer than the trial, do you want me to bring them out and ask them if they believe they’re deadlocked?

DEFENSE COUNSEL: Well, keep deliberating.

THE COURT: I’m sorry?

DEFENSE COUNSEL: Keep deliberating.

THE COURT: I’m sorry?

DEFENSE COUNSEL: Keep deliberating.

THE COURT: It’s 8:40. How long do you think I’m going to let them deliberate?

DEFENSE COUNSEL: I don’t know, Judge. Or Prim them.

THE COURT: I’m not going to do that. How long do you think I’m going to let them deliberate?

DEFENSE COUNSEL: I wouldn’t even try to guess what you would do.

PROSECUTOR: Answer, keep deliberating.

THE COURT: What do you think?

DEFENSE COUNSEL: We would like them to keep deliberating.

THE COURT: ‘Ladies and gentlemen of the jury, continue to deliberate.’

I can tell you right now that by 9:15 if they don’t have a verdict, I’m going to call them out and ask them -- ask the foreperson and see where we go.

DEFENSE COUNSEL: Okay.

THE COURT: I can send them home and let them come back tomorrow or hang. It’s a pretty straightforward case.

DEFENSE COUNSEL: Come back tomorrow.

PROSECUTOR: That’s my preference.

DEFENSE COUNSEL: That’s my, of the two, that’s my preference.

THE COURT: I’m telling you what my options are. This isn’t a democracy. Stick around.”

The trial court’s response to the jury read: “Ladies and gentlemen of the jury[,] continue to deliberate!”

¶ 59 At approximately 9 p.m., the jury sent a third note that read: “One of the jurors is waivering [*sic*] so he can go home. Can we get an alternate?” Lower on the same page was another question: “Can we get testimony of Officer Hubert[s]? Specifically the discussion about

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the police report?” Both the State and defense counsel agreed that Huberts’ testimony should be provided to the jury. The trial court responded: “Okay. Well, I will do that, but it’s way too late to do that tonight. So I’m going to see what the foreperson says and then I’ll send them back and I’ll ask you.”

¶ 60 The jury was brought out, and the trial court asked the foreperson, “if I allow the jury to deliberate any more tonight, do you think it would prove fruitful? And that’s just a yes or no.” The foreperson replied, “Yes.” The court responded:

“All right. I’ll -- here’s the answer to the first question:

The alternates are not available. And the transcript would not be available tonight, at least not in the amount of time that I’m going to allow you to deliberate tonight. So it’s just not feasible.

So go back. And if I don’t hear from you, I’ll call you out in a little bit.”

At 9:45 p.m., the jury reached a verdict, finding defendant guilty of unlawful use of a weapon by a felon for his possession of both the firearm and the ammunition.

¶ 61 On appeal, defendant argues that the trial court’s response to the third note did not address the concerns of the “hold-out juror” and deprived defendant of his right to an impartial jury. Defendant admits that defense counsel did not object to the court’s instruction to the jury, so the error is not properly preserved. However, he asks us to review his claim for plain error.

¶ 62 As noted, “the plain-error doctrine allows a reviewing court to consider unpreserved error when (1) a clear or obvious error occurred and the evidence is so closely balanced that the error

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alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence.” *Piatkowski*, 225 Ill. 2d at 565. In a plain error analysis, “it is the defendant who bears the burden of persuasion.” *Woods*, 214 Ill. 2d at 471. However, in order to find plain error, we must first find that the trial court committed some error. *Piatkowski*, 225 Ill. 2d at 565 (“the first step is to determine whether error occurred”).

¶ 63 “A trial court may not ‘hasten’ a verdict by giving the jury an instruction that has the effect of coercing jurors into surrendering their views.” *People v. Boyd*, 366 Ill. App. 3d 84, 99 (2006) (quoting *People v. Gregory*, 184 Ill. App. 3d 676, 680-81 (1989)). Instead, “ ‘[a] court’s instruction to a jury to continue deliberating should be simple, neutral, and not coercive’ and should avoid implying that the majority view is the correct one.” *People v. Love*, 377 Ill. App. 3d 306, 316 (2007) (quoting *Gregory*, 184 Ill. App. 3d at 681). “The test for determining whether the trial court’s comments to the jury were improper in this context is whether, under the totality of the circumstances, the language used by the court actually interfered with the jury’s deliberations and coerced a guilty verdict.” *People v. McCoy*, 405 Ill. App. 3d 269, 275 (2010). “Since coercion is a highly subjective concept that does not lend itself to precise definition or testing, the reviewing court’s decision often turns on the difficult task of ascertaining whether the challenged comments imposed such pressure on the minority jurors that it caused them to defer to the conclusion of the majority for the purpose of expediting a verdict.” *People v. Fields*, 285 Ill. App. 3d 1020, 1029 (1996).

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¶ 64 “The circuit court has discretion in determining how best to respond to a jury question, and this court will review any such response for an abuse of discretion.” *People v. Averett*, 381 Ill. App. 3d 1001, 1012 (2008) (citing *People v. Reid*, 136 Ill. 2d 27, 38-39 (1990)).

Additionally, “[t]he determinations of what length of time is reasonable to permit a jury to deliberate, whether a jury should continue to deliberate after it has indicated that it is hopelessly deadlocked, and whether to sequester a jury that has more than once indicated that it cannot reach a verdict are matters within the discretion of the trial court.” *People v. Harris*, 294 Ill. App. 3d 561, 568 (1998) (citing *People v. Allen*, 47 Ill. App. 3d 900 (1977)). See also *People v. Daily*, 41 Ill. 2d 116, 121 (1968) (“The length of jury deliberations is a matter which rests within the sound discretion of the trial court and its judgment in this regard will not be disturbed unless this discretion has been clearly abused.”). “An abuse of discretion will be found only where the trial court’s ruling is arbitrary, fanciful, unreasonable, or where no reasonable person would take the view adopted by the trial court.” *People v. Hall*, 195 Ill. 2d 1, 20 (2000).

¶ 65 In the case at bar, we cannot find that the trial court abused its discretion in instructing the jury to continue deliberating in response to the jury’s third note. Defendant argues that instructing the jury to continue deliberating in response to the third note “suggested to the jury that they were not going to be sent home until they reached a verdict in this case,” “exacerbate[ing]” the “waivering [*sic*]” juror’s concerns. We cannot agree. None of the trial court’s comments to the jury in any way indicated that the jury was “not going to be sent home until they reached a verdict.” Upon receiving the third note, the jury was brought out, and the trial court asked the foreperson, “if I allow the jury to deliberate any more tonight, do you think it

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would prove fruitful? And that's just a yes or no." The foreperson replied, "Yes." The court responded: "All right. I'll -- here's the answer to the first question: The alternates are not available. And the transcript would not be available tonight, at least *not in the amount of time that I'm going to allow you to deliberate tonight*. So it's just not feasible. So go back. And if I don't hear from you, *I'll call you out in a little bit*." (Emphases added.) Thus, the trial court's comments did not indicate that the jury would be deliberating until it reached a verdict but instead would only be permitted to deliberate for "a little bit," after the jury foreperson had indicated that such deliberations would be fruitful. See *People v. Outlaw*, 388 Ill. App. 3d 1072, 1095 (2009) (noting that the trial court instructed the jury to deliberate for a " 'little while longer' " and that "[s]uch language did not send the message that the jurors would not be going home unless they returned a unanimous verdict"). We cannot find these remarks coercive.

¶ 66 Moreover, the jury did not return a verdict immediately upon resuming deliberations, but continued deliberating for approximately 45 minutes. "The length of deliberations following the instruction is not alone conclusive in determining whether a verdict was coerced." *Outlaw*, 388 Ill. App. 3d at 1095. Notably brief deliberations, however, invite the inference that the trial court's remarks were the primary factor in the procurement of the verdict. *People v. Branch*, 123 Ill. App. 3d 245, 252 (1984). Here, the 45 minutes that passed between the jury being brought out and its verdict did not represent "notably brief deliberations" such that there would be an inference that the trial court's remarks were the primary factor in the procurement of the verdict. See *Branch*, 123 Ill. App. 3d at 252. In the case at bar, the jury deliberated for approximately two and a half hours prior to its second jury note, asking for the procedure in the event they were

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deadlocked, then deliberated for another half of an hour prior to sending the third note. After being brought into the courtroom to speak with the trial court, the jury reached a verdict in approximately 45 minutes. This has been considered a sufficiently lengthy period of time to suggest that the verdict was not hastened. See, e.g., *People v. Steidl*, 142 Ill. 2d 204, 232 (1991) (45 minutes sufficient); *People v. Hanks*, 210 Ill. App. 3d 817, 823 (1991) (45 minutes sufficient); *People v. Thomas*, 185 Ill. App. 3d 1050, 1058 (1989) (35 minutes sufficient).

¶ 67 Additionally, we find defendant's analogy to cases in which a verdict is returned quickly after a sequestration warning to be unpersuasive. Defendant points to *People v. Friedman*, 144 Ill. App. 3d 895 (1986), *People v. Branch*, 123 Ill. App. 3d 245 (1984), and *People v. Ross*, 303 Ill. App. 3d 966 (1999), as analogous to the case at bar. We find these cases inapposite. In *Friedman*, the jury sent a note inquiring about the meaning of a term contained in the jury instruction for theft. *Friedman*, 144 Ill. App. 3d at 903. The trial court orally clarified the instruction, then stated that “ ‘[a]s long as you're out here I will tell you that in about half an hour we have to arrange overnight accommodations for you' ”; the jury returned verdicts of guilty on all counts five minutes later. *Friedman*, 144 Ill. App. 3d at 903. The appellate court found that the fact that the jury deliberated for over four hours prior to the remark about sequestration and only five minutes thereafter suggested that the remark impermissibly hastened the verdict. *Friedman*, 144 Ill. App. 3d at 903-04. In the case at bar, however, the jury deliberated for 45 minutes, not 5 minutes, after the court's instructions. Additionally, in the case at bar, unlike in *Friedman*, the trial court had not explained a newly-defined legal concept immediately prior to the verdict. See *McCoy*, 405 Ill. App. 3d at 278 (noting that, in *Friedman*, “it was clear that the

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jury could not have given due consideration to the newly-defined legal concept in five minutes and, therefore, its verdict must have been coerced by the sequestration announcement”).

¶ 68 In *Branch*, after four and a half hours of deliberating, the jury informed the trial court that there was one individual who was voting not guilty “ ‘because they do not want anyone to go to jail.’ ” *Branch*, 123 Ill. App. 3d at 250. The trial court brought in the jury and referred to the “ ‘dilemma’ ” the jury faced, indicating that the person referenced in the note “ ‘evidently should not have received jury service.’ ” *Branch*, 123 Ill. App. 3d at 250. The court stated that it would arrange overnight accommodations in an hour and that “ ‘[w]e won’t cut this jury short because of the dilemma it seems to indicate or the impasse that has been caused.’ ” *Branch*, 123 Ill. App. 3d at 250. The jury reached a verdict 10 minutes later, which the appellate court found demonstrated the pressure placed on the minority juror by the trial court’s remarks. *Branch*, 123 Ill. App. 3d at 252. In the case at bar, by contrast, the jury deliberated for 45 minutes and the trial court did not make any comments singling out the “waivering [*sic*]” juror.

¶ 69 In *Ross*, after approximately four hours of jury deliberations, the trial court summoned the jury on its own initiative and without defense counsel being present, asking the jury whether it would be able to reach a verdict and indicating that it would call the jury out shortly. *Ross*, 303 Ill. App. 3d at 973. The jury reached a verdict 16 minutes later. *Ross*, 303 Ill. App. 3d at 977. The appellate court found that the *ex parte* communication with the jury entitled the defendant to a new trial unless the State was able to establish that the error was harmless beyond a reasonable doubt. *Ross*, 303 Ill. App. 3d at 975-76. The appellate court found that the State was unable to do so, given the short amount of time the jury deliberated after the remarks and the fact that the

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trial court's comment that it would call the jury out shortly was susceptible to a coercive interpretation. *Ross*, 303 Ill. App. 3d at 978-79. In the case at bar, however, the jury deliberated for an additional 45 minutes and the trial court's comment was not coercive. We also note the different burdens in the two cases: in *Ross*, the State had the burden of proving the error harmless beyond a reasonable doubt, while in a plain-error analysis as is present here, the defendant bears the burden of persuasion. *Woods*, 214 Ill. 2d at 471 (in a plain error analysis, "it is the defendant who bears the burden of persuasion").

¶ 70 As a final matter, defendant suggests that the trial court's comments "ran contrary to the essence" of *People v. Prim*, 53 Ill. 2d 62 (1972), in which our supreme court set forth instructions to be provided to deadlocked juries.² Defendant argues that the court's comments in the case at bar "did not address the juror's concerns about wanting to go home and instead directed the jury to abandon all honest conviction in order to reach a verdict." However, as Justice Wolfson succinctly noted in *Boyd*, "[t]he goal of the instruction recommended in *Prim* was to eliminate supplemental instructions to jurors to 'heed the majority' as a means of securing the verdict. [Citation.] In this case, the jury did not say it was deadlocked. Even if it had, the judge's response was neutral, and the language was not coercive or intended to 'hasten' the verdict." *Boyd*, 366 Ill. App. 3d at 99.

¶ 71 Accordingly, since we can find no error in the trial court's instruction to the jury to continue deliberating, it follows that there can be no plain error. *Piatkowski*, 225 Ill. 2d at 565

² We note that defense counsel did not request a *Prim* instruction in response to the third jury note.

(“the first step is to determine whether error occurred”).

¶ 72 III. Ineffective Assistance of Counsel

¶ 73 Finally, defendant argues that he is entitled to a new trial because trial counsel was ineffective (1) in failing to impeach Huberts’ testimony with the his inconsistent preliminary hearing testimony; (2) in failing to object to the trial court’s instruction to the jury to continue deliberating; and (3) in failing to accurately recall the number of peremptory challenges used.

¶ 74 A. Two-Prong Test

¶ 75 The Illinois Supreme Court has held that, to determine whether a defendant was denied his or her right to effective assistance of counsel, an appellate court must apply the two-prong test set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Colon*, 225 Ill. 2d 125, 135 (2007) (citing *People v. Albanese*, 104 Ill. 2d 504 (1984) (adopting *Strickland*)). Under *Strickland*, a defendant must prove both (1) his attorney’s actions constituted errors so serious as to fall below an objective standard of reasonableness; and (2) absent these errors, there was a reasonable probability that his trial would have resulted in a different outcome. *People v. Ward*, 371 Ill. App. 3d 382, 434 (2007) (citing *Strickland*, 466 U.S. at 687-94).

¶ 76 Under the first prong of the *Strickland* test, the defendant must prove that his counsel’s performance fell below an objective standard of reasonableness “under prevailing professional norms.” *Colon*, 225 Ill. 2d at 135; *People v. Evans*, 209 Ill. 2d 194, 220 (2004). Under the second prong, the defendant must show that, “but for” counsel’s deficient performance, there is a reasonable probability that the result of the proceeding would have been different. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. “[A] reasonable probability that the result would have

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been different is a probability sufficient to undermine confidence in the outcome—or put another way, that counsel’s deficient performance rendered the result of the trial unreliable or fundamentally unfair.” *Evans*, 209 Ill. 2d at 220; *Colon*, 225 Ill. 2d at 135. In other words, the defendant was prejudiced by his attorney’s performance.

¶ 77 To prevail, the defendant must satisfy both prongs of the *Strickland* test. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. “That is, if an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel’s performance was deficient.” *People v. Graham*, 206 Ill. 2d 465, 476 (2003). We do not need to consider the first prong of the *Strickland* test when the second prong cannot be satisfied. *Graham*, 206 Ill. 2d at 476.

¶ 78 B. Failure to Impeach Huberts

¶ 79 Defendant’s first claim of ineffectiveness is that his trial counsel was ineffective in failing to impeach Huberts with his preliminary hearing testimony. Specifically, defendant argues that during the preliminary hearing, Huberts testified that he recovered the gun, while during trial, he testified consistently with Carroll’s testimony that Carroll recovered the gun. During the preliminary hearing, Huberts was questioned about the gun:

“PROSECUTOR: What, if anything did you observe as you were pursuing him?

HUBERTS: When he got to the rear of the location where he fled to, he dropped to the ground with his right hand a chrome nickle I believe it was a Rhome 38 caliber revolver.

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PROSECUTOR: Did you recover the weapon?

HUBERTS: I did.”

However, during trial, Huberts testified that after Carroll assisted Huberts in handcuffing defendant, they picked up the handgun; Huberts testified that Carroll recovered the gun first. Defendant claims that his trial counsel should have impeached Huberts with this inconsistent testimony. We do not find this argument persuasive.

¶ 80 Generally, the examination or impeachment of a witness is considered to be trial strategy, which does not support a claim of ineffective assistance of counsel. *People v. Smith*, 177 Ill. 2d 53, 92 (1997); *People v. Pecoraro*, 175 Ill. 2d 294, 326 (1997). “The manner in which to cross-examine a particular witness involves the exercise of professional judgment which is entitled to substantial deference from a reviewing court.” *Pecoraro*, 175 Ill. 2d at 326-27. The only way for a defendant to prevail on his ineffectiveness claim is by “showing that counsel’s approach to cross-examination was objectively unreasonable.” *Pecoraro*, 175 Ill. 2d at 327. Defendant cannot make such a showing here.

¶ 81 “When assessing the importance of the failure to impeach for purposes of a *Strickland* claim, ‘the value of the potentially impeaching material must be placed in perspective.’ ” *People v. Salgado*, 263 Ill. App. 3d 238, 247 (1994) (quoting *People v. Jimerson*, 127 Ill. 2d 12, 33 (1989)). In the case at bar, defendant notes that his defense focused on the State’s failure to prove him guilty beyond a reasonable doubt due to the inconsistent accounts of the alleged offense and characterizes Huberts’ impeachment with his preliminary hearing testimony as “*necessary* to the argument’s success” (emphasis in original) because “[i]mpeaching Huberts

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with his inconsistent testimony about the gun greatly weakens his credibility.” We cannot agree.

¶ 82 In the case at bar, the purported inconsistency concerns whether Huberts or Carroll physically recovered the gun. However, throughout the trial, Huberts alternated testifying that “we” recovered the gun, “I” recovered the gun, and “my partner” recovered the gun, so to the extent that one more instance of Huberts testifying that “I” recovered the gun would be impeaching, it would add little to the already-existing testimony.

¶ 83 Moreover, it is not entirely clear that Huberts’ testimony was even inconsistent. During trial, there were several instances in which the recovery of the gun was described as a team effort, and Huberts clearly considered himself to have participated in the gun’s recovery. For instance, the prosecutor asked “did you and your partner pick up the gun from where it landed from when the defendant tossed it?” and Huberts responded “[y]es.” Likewise, the prosecutor asked Huberts whether there was “anything else on the grass where you and your partner recovered the gun that the defendant dropped?” When Huberts was presented with the gun at trial, he identified it as “the revolver that we recovered from the scene” and identified a photograph as “an aerial view of the area in which I recovered the firearm” and another as “the rear chain-link *** fence and the yard where we recovered the firearm.” The only time that Huberts specified that Carroll was the one who physically picked the gun up was when specifically asked:

“PROSECUTOR: Now, you and your partner were both in
the backyard when the gun was recovered, correct?

HUBERTS: Yes.

PROSECUTOR: Who actually recovered the gun?

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HUBERTS: My partner actually recovered it first.”

Huberts testified the same way on cross-examination:

“DEFENSE COUNSEL: [Y]ou stated in this case you and your partner recovered the gun that was in the yard, is that correct?

HUBERTS: Yes.

DEFENSE COUNSEL: Who actually picked the gun up?

HUBERTS: My partner.

DEFENSE COUNSEL: And so you didn’t pick it up together, right?

HUBERTS: No.”

¶ 84 Additionally, defense counsel cross-examined Huberts thoroughly, challenging Huberts about the lighting at the scene and his unfamiliarity with the backyard of the residence. Defense counsel also cross-examined Huberts on inconsistencies between the police report and his testimony, namely, the failure of the police report to mention that defendant was brandishing his gun while running down the gangway, and also elicited testimony that no fingerprint or DNA testing was performed on the gun.

¶ 85 Finally, defense counsel’s strategy, as demonstrated in her closing argument, focused on two things: (1) the inconsistency over defendant’s presence at the scene, based on Carroll’s inability to identify defendant in court, and (2) the evidence of defendant’s possession of the gun, focusing on the lighting at the scene and the unknown individual who was running with defendant. Defense counsel specifically stated during closing: “Officer Huberts responded to a

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call on that day. He went to that area. There was a group of men. He recovered a gun in the backyard. *That's not what I'm saying is untrue. I'm saying that *** it was not Maurice Wilson's gun.*" (Emphasis added.) Defense counsel made the choice to focus on what the evidence demonstrates were her strongest arguments. We cannot find that this strategy was objectively unreasonable as we must look to counsel's entire representation of defendant at trial (*People v. Max*, 2012 IL App (3d) 110385, ¶ 65), and, accordingly, defendant's claim of ineffective assistance of counsel must fail.

¶ 86 C. Failure to Object to Instruction to Continue Deliberating

¶ 87 Next, defendant claims that his trial counsel was ineffective in failing to object to the trial court's instruction to the jury to continue deliberating after receiving the note that a juror was "waivering [*sic*] so he can go home." As explained above, the trial court's comments to the jury were not coercive and did not hasten the verdict. Accordingly, there was no showing of prejudice from defense counsel's failure to object to the instruction and defendant's claim of ineffective assistance of counsel must fail.

¶ 88 D. Failure to Recall Number of Peremptory Challenges

¶ 89 Finally, defendant claims that his trial counsel was ineffective in failing to accurately recall the number of peremptory challenges she had used while arguing defendant's motion for a new trial. Defendant claims that this inaccurate recollection resulted in the waiver of the ability to challenge the trial court's denial of counsel's requests to strike three venirepeople for cause; defendant argues that one of the three, V.L., should have been excused for cause. However, we agree with the State that defense counsel's inaccurate recollection did not prejudice defendant

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because any claim as to the propriety of V.L. as a juror was forfeited when defense counsel did not strike her using an available peremptory challenge.³

¶ 90 “This court has repeatedly stated that ‘we will review the trial court’s ruling on a challenge for cause only when an objectionable juror was forced upon a party *after* it had exhausted its peremptory challenges.’ ” (Emphasis added in *Bowens*.) *People v. Bowens*, 407 Ill. App. 3d 1094, 1099-1100 (2011) (quoting *Grady v. Marchini*, 375 Ill. App. 3d 174, 179 (2007)).

Where defense counsel has peremptory challenges available and chooses not to use them to exclude a juror, “circumstances compel the conclusion that defendant’s decision not to peremptorily remove [the juror] was an affirmative acquiescence to [the juror’s] jury service, which thereby constitutes a waiver of this issue on appeal.” *Bowens*, 407 Ill. App. 3d at 1100.

¶ 91 We find *Bowens* factually analogous to the case at bar. In *Bowens*, defense counsel challenged a juror for cause and, when the trial court denied that challenge, the defense did not exercise one of its remaining peremptory challenges to remove the juror. *Bowens*, 407 Ill. App. 3d at 1100. The defense later exercised all of its peremptory challenges and did not request additional peremptory challenges. *Bowens*, 407 Ill. App. 3d at 1100. The jury found the defendant guilty and the defendant appealed, claiming the trial court erred in failing to excuse the aforementioned juror for cause. *Bowens*, 407 Ill. App. 3d at 1098.

¶ 92 On appeal, the appellate court found that the defense forfeited this issue because, at the time the trial court denied excusing the juror for cause, the defense had peremptory challenges

³ We note that defendant does not claim that his trial counsel was ineffective in failing to use a peremptory challenge to strike V.L.

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available and chose not to exercise them. *Bowens*, 407 Ill. App. 3d at 1100. The court noted: “[i]f defendant believed that a fair trial required juror Bauknecht to be excluded, he should have removed him from the second panel of prospective jurors with one of his remaining peremptory challenges. After all, this record clearly shows that defense counsel understood both the availability of defendant’s peremptory challenges and how to use them. These circumstances compel the conclusion that defendant’s decision not to peremptorily remove juror Bauknecht was an affirmative acquiescence to Bauknecht’s jury service, which thereby constitutes a waiver of this issue on appeal.” *Bowens*, 407 Ill. App. 3d at 1100.

¶ 93 Similarly, in the case at bar, in the initial group of 20 venirepeople, the defense challenged three jurors for cause, including V.L., and the trial court denied those challenges. At that time, the defense did not use peremptory challenges against V.L. or one other juror it had challenged for cause, even though all of its peremptory challenges were available. Defense counsel used four peremptory challenges against the venire in the initial group of 20, two peremptory challenges against the venire in the next group of 15, and the remaining peremptory challenge against a venireperson in the final group of five, exhausting all of its peremptory challenges. Defense counsel did not request additional peremptory challenges. We agree with *Bowens* that, by choosing not to use peremptory challenges against V.L. or the other venireperson it had challenged for cause, defense counsel affirmatively acquiesced in V.L.’s jury service, forfeiting the issue on appeal. Since the issue was already forfeited, the fact that defense counsel inaccurately remembered the number of peremptory challenges that she had used when arguing the motion for a new trial does not have any effect on the outcome of defendant’s case and,

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consequently, cannot constitute ineffective assistance of counsel.

¶ 94 We find defendant's reliance on *People v. Pendleton*, 279 Ill. App. 3d 669 (1996), in support of his argument to be unpersuasive. In *Pendleton*, we denied defendant's request for a new trial, noting that there were no grounds for reversal "where the defendant used peremptory challenges on venire members the trial court should have dismissed for cause, unless the defendant exhausted all of his peremptory challenges and an objectionable juror sat on the jury." *Pendleton*, 279 Ill. App. 3d at 677. Defendant argues that, here, since defense counsel used all of her peremptory challenges and an objectionable juror sat on the jury, the fact that defense counsel could have used a peremptory challenge on V.L. and the other venireperson but chose not to does not preclude defendant from raising the issue on appeal. Defendant argues that since the issue was not forfeited on appeal, defense counsel's inaccurate recollection *did* prejudice defendant. We cannot agree with defendant's interpretation of *Pendleton*.

¶ 95 In *Pendleton*, the defense requested that the trial court excuse two jurors for cause and the trial court denied both requests. *Pendleton*, 279 Ill. App. 3d at 672. The defense then excused the jurors using peremptory challenges. *Pendleton*, 279 Ill. App. 3d at 672. The defendant argued on appeal that the trial court violated his due process rights under the Illinois Constitution because the defense had to exercise two of its peremptory challenges to excuse jurors that should have been excused for cause by the trial court. *Pendleton*, 279 Ill. App. 3d at 674.

¶ 96 *Pendleton* does not support defendant's argument in the case at bar. In *Pendleton*, the question was whether, by forcing the defense to use peremptory challenges to excuse jurors that should have been excused for cause, the defendant was forced to accept an objectionable juror.

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There, since the defendant had not alleged that an objectionable juror sat on his jury, the failure to excuse the jurors for cause was not grounds for reversal. *Pendleton*, 279 Ill. App. 3d at 675, 677. In the case at bar, the dispositive issue is that defendant *did not* use peremptory challenges to excuse the jurors he claims should have been excused for cause. Thus, *Pendleton* is inapposite.

¶ 97 Defendant argues that “the issue here is not whether defense counsel made a strategic decision to accept or peremptorily strike jurors: the issue is whether counsel was deficient for not recalling how many peremptory strikes she had used.” However, to prevail in an ineffective assistance of counsel claim, the defendant must satisfy both prongs of the *Strickland* test. *Colon*, 225 Ill. 2d at 135; *Evans*, 209 Ill. 2d at 220. “[I]f an ineffective-assistance claim can be disposed of because the defendant suffered no prejudice, we need not determine whether counsel’s performance was deficient.” *Graham*, 206 Ill. 2d at 476. Here, even if defendant is correct that defense counsel’s performance was deficient in her failure to recall the number of peremptory challenges used while she was arguing the motion for a new trial, the prejudice prong of the *Strickland* analysis would need to be satisfied in order to find ineffective assistance of counsel. However, the prejudice prong cannot be satisfied — even if defendant’s trial counsel had remembered that she exercised all of the seven available peremptory challenges, the outcome would remain the same because the issue had already been forfeited by the failure to excuse the jurors using available peremptory challenges. Accordingly, since the prejudice prong of the *Strickland* analysis cannot be satisfied, we cannot find ineffective assistance of counsel.

¶ 98

CONCLUSION

¶ 99 For the foregoing reasons, we affirm the decision of the trial court. First, we find that most of the State's closing argument was proper and, to the extent that any comments were improper, the comments did not constitute substantial prejudice such that reversal is necessary. Second, we find that the trial court's instruction for the jury to continue deliberating was not coercive and did not hasten the verdict. Third, we find that defendant's trial counsel was not ineffective in her examination of Officer Huberts, in her failure to object to the trial court's instruction to the jury to continue deliberating, or in her failure to recall the number of peremptory challenges used in her argument on defendant's motion for a new trial.

¶ 100 Affirmed.