2015 IL App (1st) 123492-U

Sixth Division
Order filed: January 16, 2015

No. 1-12-3492

IN THE

APPELLATE COURT OF ILLINOIS

FIRST DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CHRISTOPHER KOVANDA, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Cook County. No. 10-CR-18298 Honorable Mary Margaret Brosnahan, Judge, Presiding.

PRESIDING JUSTICE HOFFMAN delivered the judgment of the court.
Justice Lampkin concurred in the judgment.
Justice Hall specially concurred.

ORDER

¶ 1 *Held*: The judgment of the circuit court was affirmed where the defendant's claims of ineffective assistance of counsel, prejudicial errors in opening and closing arguments, and that the State improperly shifted the burden of proof during the questioning of its fingerprint expert, failed.

¶ 2 Following a jury trial, the defendant, Christopher Kovanda, was convicted of attempted first-degree murder (720 ILCS 5/9-1(a)(1) (West 2010)) and sentenced to 45 years in prison. In this direct appeal from that conviction, the defendant argues that he is entitled to a new trial because: (1) his trial counsel rendered ineffective assistance; (2) prejudicial errors occurred during opening and closing arguments; and (3) the State shifted the burden of proof during its

questioning of its fingerprint expert. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 In October 2010, the defendant was indicted on multiple counts of attempted first-degree murder, home invasion (720 ILCS 5/12-11(a)(3) (West 2010)), and aggravated battery with a firearm (720 ILCS 5/12-4.2(a)(1) (West 2010)), in connection with the home invasion and shooting of Robert Sutton on June 17, 2010, which left Sutton partially paralyzed.

¶ 4 In a motion *in limine*, the defendant moved to suppress several pretrial eyewitness identifications, arguing that the identifications were done in violation of his sixth amendment right to counsel. The circuit court denied that motion, finding that no right to counsel attached at the time of the identifications because the defendant had not yet been charged with any crime.

¶ 5 The State eventually tried the defendant on only one count of attempted first-degree murder and one count of aggravated battery with a firearm. During its opening statements, the State commented:

> "It's often said there's no place like home, a man's home is his castle. It's at least the spot where we go at the end of the day and rest our heads and go to sleep. It's a secure spot for most people to rest their weary bones."

¶ 6 The State then summarized the events of the night of June 16 and morning of June 17, 2010, asserting that the defendant had shattered Robert Sutton's ability to enjoy his secure, serene home by invading it, beating him, and shooting him in the head in his living room.

¶ 7 Testifying first for the State, Doris Sutton, the victim's mother, said that, in June 2010, she resided in a second-floor apartment on Barry Street in Chicago, along with her three sons, Robert, Brandon, and Freedom; her daughter, Mercedes; her baby granddaughter; and her boyfriend, Adam Gerhart. According to Doris, on the night of June 16, 2010, Ivory Young,

Brandon's girlfriend, who lived in the apartment next door, came over to talk to her. As Ivory was leaving just before midnight, Doris saw four men enter her home. She testified that she recognized one of the men as Elias Saez, a schoolmate of Brandon's, but that she had never seen the three other men before that night. In court, Doris identified the defendant as one of the four men who entered her home that evening. Doris told the defendant to leave her apartment to which he responded by raising his shirt and revealing a gun in his waistband. She then ran out of her apartment, pushing Mercedes and her boyfriend, Alexis Diaz, with her, and she went to Ivory's apartment to call the police. While on the phone with the 911 operator, Doris heard a loud noise and told the operator that she thought her son had been shot. Shortly thereafter, Adam came to Ivory's apartment, bleeding from the head and stating that the gunman had hit him. Doris testified that she ran back to her apartment and saw Robert lying on the floor in a pool of blood.

¶ 8 On cross-examination, Doris admitted that she was unable to provide a description of the defendant when the police arrived at the scene because she "was in shock" and that she had never provided the police with a description thereafter. She also admitted that, in September 2010, she viewed a lineup at the police station, but she was unable to identify anyone from that lineup.

¶ 9 Robert testified that his gunshot injury had left him paralyzed on his right side and negatively affected his memory, including his ability to remember names. He stated that, on the night of the shooting, he was out drinking with three or four friends, including Megan Grace, his ex-girlfriend, and Elias, both of whom he identified through photos instead of by their names. Robert recalled having a physical altercation with Elias and Grace before leaving for his home, but he did not recall how he got home. According to Robert, he fell asleep in his living room and was awakened by four men who began kicking and punching him. He recognized one man as

Elias and the other he identified as a man he had met about five months earlier. In court, Robert identified the defendant as that man. He stated that his last memory of that night was the defendant holding what he thought was a phone and his next memory was waking up in the hospital.

¶ 10 On September 23, 2010, the police asked Robert to view a lineup at the police station from which he identified the defendant. Robert also testified that a defense investigator approached him in August 2011, but he told the investigator that he would not speak to him.

¶ 11 On cross-examination, Robert stated that he did not fight with the defendant on the day of the shooting, but on their previous encounter, the defendant "was talking bad stuff" to him and called him "a spic." However, Robert denied that he wanted revenge for the defendant's use of a racial slur. He also denied that his head injury affected his ability to identify the defendant. Robert further reiterated that he never told the defense investigator that he did not recall the shooting, but told him only that he would not speak to him.

¶ 12 Mercedes testified that, on the night of the shooting, she was outside of her apartment building with her boyfriend, Alexis. Around 11:30 p.m., she saw Robert and Elias walking down the block toward her. She testified that she knew Elias as a close family friend for the last five years. As the two men came closer, Mercedes observed that they were intoxicated, and she heard Elias tell Robert to go upstairs because he was drunk. Eventually, she and Doris coaxed Robert upstairs, and Elias left the building. Mercedes testified that, after getting Robert upstairs, she and Alexis began walking down the stairs to the first floor when she saw Elias re-enter the building with three other men. The four men, one of whom carried a six-inch piece of glass, began coming upstairs. Mercedes identified the defendant in court as the man she saw carrying the glass. According to Mercedes, as the defendant entered the building, she asked him what

was in his hand, and he dropped the glass outside the front entrance of the building. As the men passed by her, Mercedes knocked one of the offenders to the ground. Thereafter, she and Alexis followed the defendant and the others upstairs to her apartment.

¶ 13 In the apartment, Robert was asleep on the couch and Doris and Brandon were present in the living room. Mercedes heard Doris tell the defendant to leave the residence, but he displayed a gun in his waistband and threatened to shoot everyone if she did not move out of the way. According to Mercedes, Doris then pushed her, Alexis and Brandon out of the apartment and into Ivory's apartment and called the police. Within minutes, the police arrived, and Mercedes told a uniformed officer that she had recognized Elias and assisted the police in locating him that night. She also directed the police to the site where she saw the defendant drop the glass. Chicago Police Officer Eric Miehle confirmed that Mercedes helped him locate Elias and identified the area where she saw the defendant drop the piece of glass. Chicago Police Officer Stiner identified the glass evidence which he had inventoried, but he did not know when, or if, any fingerprint testing had been performed on it.

¶ 14 On September 23, 2010, Mercedes viewed a lineup at the police station from which she identified the defendant as the man she saw with the gun in his waistband. She acknowledged that she had never seen the defendant before that night.

¶ 15 On cross-examination, Mercedes admitted that she initially described the man with the gun as a 6' tall, blond, blue-eyed Caucasian man who wore a Cubs shirt and had what appeared to be a spider web tattoo on his neck. Acknowledging that the defendant has neither blond hair nor blue eyes, Mercedes explained that his hair appeared blond in the light and that she was not positive the mark on his neck was actually a tattoo or just dirt.

¶ 16 Brandon testified that he went into the hallway after Ivory saw four men entering their building. He recognized one man as his classmate, Elias, and he identified the defendant in court as one of the others. Brandon said that he was standing "face to face" with the defendant in the hallway and said "nice shirt" to him, referring to his Cubs shirt. He acknowledged that he had never seen the defendant before that night. The four men entered the Sutton apartment and surrounded Robert. Brandon heard Doris scream that someone had a gun, and then she pushed him into Ivory's apartment. On September 23, 2010, Brandon went to the police station and identified the defendant from a lineup.

¶ 17 On cross-examination, Brandon admitted that he spoke to the police on June 20, 2010, but he denied telling officers that he was unable to provide a description of the defendant. Brandon stated that he told the police that he did not know the defendant, but that he "would remember his face." He admitted, however, that he never provided the police with a physical description of the defendant, but had mentioned that he had been wearing a Cubs shirt.

¶ 18 Alexis initially testified that he did not have any recollection of the events of June 16-17, 2010. However, upon further questioning, he then testified about the shooting and his testimony was consistent with Mercedes's. According to Alexis, he was "really nervous" on the witness stand. He also identified the defendant in court as the individual he saw inside the Sutton apartment with a gun. On September 23, 2010, Alexis identified the defendant at the police station from a lineup.

¶ 19 On cross-examination, Alexis admitted that he described the defendant to the police as being 6'2" tall and wearing a powder blue Cubs shirt, but he later denied providing a height estimate.

¶ 20 Ivory testified consistently with Brandon, stating that she recognized Elias as one of the four men entering the apartment. She also identified the defendant in court as one of the men and said that she observed him from a close proximity while he was in the apartment hallway. On September 24, 2010, Ivory went to the police station and identified the defendant from a lineup.

¶ 21 On cross-examination, Ivory admitted that she did not provide a physical description of the defendant to the police, but initially told them only that he had been wearing a Cubs jacket. Initially, she did not recall the police asking her to view a photo lineup, but then recalled speaking to the police on June 20, 2010, and being shown photographs. She admitted that she was unable to identify anyone from the photos shown to her.

¶ 22 Zbigniaw Niewdach, a forensic investigator with the Chicago Police Department, identified the various photographs he took of the crime scene and testified that he collected no other evidence from inside the Sutton apartment other than blood swabs. On cross-examination, Niewdach admitted that he was unaware whether any of the blood samples he collected were tested for DNA and that he did not look for any fingerprint evidence.

¶ 23 Chicago Police Officer Hazelhurst testified that he had been assigned to locate the defendant in connection with the June 17 shooting and that, on July 29, 2010, he received a tip from another officer that a man fitting the defendant's description had just gotten into a taxi. Officer Hazelhurst proceeded to the area, located the taxi, and activated his vehicle's police lights. When the taxi pulled over, the defendant fled the vehicle on foot. Officer Hazelhurst pursued the defendant until he escaped by running across the Kennedy Expressway.

¶ 24 Chicago Police Detective David Healey testified that, on September 23, 2010, he was told that the defendant was present in an apartment located on North Kenneth Avenue. He went to

the location, announced that he was looking for the defendant, and heard noises from within the apartment which sounded like objects being placed in front of the door. Along with his sergeant, Detective Healey forced the door open, searched for the defendant, and located him hiding under a mattress in one of the bedrooms. On cross-examination, Detective Healey admitted that he did not recall finding a blue Cubs shirt in the apartment, noting that he found nothing of any evidentiary value in the apartment.

¶ 25 Chicago Police Detective Sheamus Fergus testified that, on September 23, 2010, he was involved in arranging the police lineups for witnesses to the occurrence. He described the general lineup procedure, which involved seating four to five similar-looking people on a bench in a small room that has a one-way mirror. Witnesses are then asked to read and sign a lineup advisory form, informing them that the suspect may or may not be included in the lineup. Detective Fergus testified that he was present for the lineups viewed by Alexis, Mercedes, Robert, Ivory and Brandon, and that these procedures were followed. He confirmed that each witness viewed the lineups individually and that they were not allowed to communicate with each other during the process.

¶ 26 On cross-examination, Detective Fergus admitted that he interviewed Robert before the lineup, but did not ask him for a physical description of the defendant. He also acknowledged that having suspects viewed while seated makes it difficult for witnesses to compare their heights. Detective Fergus further admitted that some police officers were used as fillers in the lineups because there were not enough individuals in custody that looked similar to the defendant.

¶ 27 Illinois State Police Forensic Scientist Michael Cox testified that he examined the pieces of glass recovered in connection with this case, but he determined that there were no latent prints

suitable for comparison on the glass. On cross-examination, Cox admitted that he tested the glass on November 9, 2011, and that, if the glass had been kept in an evidence room in an unsealed container since June 16, 2010, any prints on the glass could have evaporated. On re-direct examination, Cox explained that, on October 24, 2011, he received a request from the State's Attorney Office to test the glass for prints.

¶ 28 Testifying for the defense, Lawrence Lasker stated that, on August 11, 2011, he spoke to Robert, who told him that he did not recall the night of the shooting. On cross-examination, Lasker admitted that he did not know the nature of Robert's injuries and that Robert had been asleep just before he questioned him. However, Lasker believed that Robert understood his questions. He also testified that he told Robert that he was a private investigator hired by an attorney named Barry Lewis, but that he did not specify that Lewis represented the defendant.

¶ 29 During closing arguments, the State argued that the Sutton apartment "became a crime scene and four lives were changed forever, all at the hands of the defendant." The State maintained that a disagreement amongst acquaintances while under the influence of alcohol had escalated "to a potentially deadly situation in which a young man's life was changed forever, and his family's sense of security was changed forever as well."

¶ 30 In rebuttal of defense counsel's argument that there was no physical evidence connecting the defendant to the crime, the State argued that, unlike stories as commonly depicted on television, "not every crime has physical evidence connecting the criminal to the offense," and "]t]here is nothing that says in order to find someone guilty, there must be physical evidence connecting him to the crime." The Assistant State's Attorney further asserted that:

> "This is not like television, folks. This is real life. *** It's real life when Doris came into this courtroom and broke down crying when she saw a picture of that blood[y]

couch. That's real life. It's real life when Robert Sutton has to limp his way into this courtroom because he's got limited use of the right side of his body because of the bullet that entered his skull and came out through his temple.

***

It's almost cowardly to go in a group of four. Robert Sutton never had a chance. He never had a chance."

¶ 31 After closing arguments were completed, the jury retired to deliberate and returned a verdict finding the defendant guilty of the attempted first-degree murder charge and not guilty of the aggravated battery with a firearm charge.

¶ 32 After filing a motion for a new trial, defense attorney withdrew as counsel and posttrial counsel subsequently amended that motion. In the amended motion, the defendant raised, in part, various claims of ineffective assistance of trial counsel and instances of the State making prejudicial and inflammatory comments in its arguments. He also argued that the witness identifications should have been suppressed. The circuit court denied the defendant's amended motion for a new trial, and proceeded to the sentencing hearing. The court sentenced the defendant to 45 years' imprisonment. Following the denial of the defendant's motion for reconsideration of his sentence, he filed the instant appeal.

¶ 33 The defendant has made various claims of ineffective assistance of trial counsel. Those claims are judged under the familiar standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). *People v. Manning*, 241 Ill. 2d 319, 326-27 (2011). Under *Strickland*, the defendant must show that (1) counsel's performance fell below an objective standard of reasonableness, and that (2) there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Id.* (citing *Strickland*, 466 U.S. at 688, 694). In

order to satisfy the deficient-performance prong of *Strickland*, a defendant must show that his counsel's performance was so inadequate that he did not receive the "counsel" guaranteed by the sixth amendment. *Id.* at 327. Counsel's performance is measured by an objective standard of competence under prevailing professional norms, and the defendant must overcome the strong presumption that counsel's conduct may have been the product of sound trial strategy. *Id.* "Matters of trial strategy are generally immune from claims of ineffective assistance of counsel." *Id.* (quoting *People v. Smith*, 195 Ill.2d 179, 188 (2000)). To satisfy the prejudice prong, a defendant must show a reasonable probability that the result of the proceeding would have been different or show that counsel's deficient performance rendered the result of the trial unreliable or the proceeding fundamentally unfair. *Id.* (citing *People v. Jackson*, 205 Ill. 2d 247, 259 (2001)). An ineffective-assistance-of-counsel claim fails if either prong of *Strickland* is not met. *People v. Nitz*, 143 Ill. 2d 82, 109 (1991).

¶ 34 The defendant first argues that his trial counsel was ineffective for failing to file a motion to suppress the pretrial lineup identifications on the basis that he was the only individual shown wearing shackles around his ankles. To prevail on such a claim, the defendant bears the burden of showing that the motion to suppress would have been granted and that the trial outcome would have been different if the evidence had been suppressed. *People v. Gabriel*, 398 Ill. App. 3d 332, 348 (2010).

¶ 35 Only where a pretrial identification is "unnecessarily suggestive" or "impermissibly suggestive" so as to produce " 'a very substantial likelihood of irreparable misidentification' " is evidence of that and any subsequent identification excluded by law under the due process clause of the fourteenth amendment. *People v. Williams*, 313 Ill. App. 3d 849, 859-60 (2000) (citing *People v. Moore*, 266 Ill.App.3d at 796-97, citing *Neil v. Biggers*, 409 U.S. 188, 196-97 (1972)).

Under this two-step analysis, the defendant must first prove that the confrontation was so unnecessarily suggestive and conducive to irreparable misidentification that he was denied due process of law. *Id.* If the defendant meets his burden, the State then has the burden of establishing that, under the totality of the circumstances, the identification made under suggestive circumstances is nonetheless reliable. *Id.* The factors to be considered in determining reliability include:

> "the opportunity of the witness to view the criminal at the time of the crime, the witness's degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation." *Id.* at 860.

¶ 36 Here, while the witnesses identified photographs of the lineup participants depicting them seated on the bench, none of them testified that they saw that the defendant was shackled at the time they viewed the lineup and identified him. As even the defendant concedes, the shackles are not visible in the photo identified by Ivory and the chain is not clearly visible in the photo identified by Robert. Moreover, given the overall physical similarities of the lineup participants, we cannot say that the mere fact that one participant in a police station lineup was shackled rendered the entire lineup unduly suggestive where the witnesses likely believed all of the individuals were in police custody. See *United States v. Traeger*, 289 F.3d 461, 475 (7th Cir. 2002) (finding the presence of the ankle strap on the defendant in a lineup was not unduly suggestive as to corrupt the reliability of the identification); *Kubat v. Thieret*, 867 F.2d 351, 358 (7th Cir. 1989) (finding use of the defendant's mug shot with date of crime stamped on it was not unduly suggestive especially where there was no testimony that the witness observed or noted the time stamps at time of identification). Thus, the defendant has failed to establish that

counsel's performance was deficient where he has failed to demonstrate that a suppression motion would have been granted on the basis of the shackling had counsel filed it.

¶ 37 Assuming *arguendo* that the defendant's shackles rendered the pretrial lineup identifications unduly suggestive, we find that the State has met its burden of establishing that, under the totality of the circumstances, the identifications were nonetheless reliable. The record reveals that the witnesses had an opportunity to see the defendant at the time of the crime while at a close proximity and that they were certain when they identified him in court. See *People v. Maloney*, 201 Ill. App. 3d 599, 607 (1990) (finding that, despite trial court's error in failing to suppress an unduly suggestive lineup identification, reversal was not warranted where in-court identifications had independent origin). While the defendant raises many arguments supporting his position that the identifications were unreliable, we do not find his arguments persuasive.

¶ 38 The defendant asserts that the witnesses only viewed the defendant "briefly." However, the length of time a witness views an offender is just one factor to be considered, and courts have upheld identifications after brief encounters similar to the encounters in this case where the witnesses were in close proximity and under a heightened awareness of danger. *People v. Dixon*, 122 Ill. App. 3d 141, 152, 460 N.E.2d 858, 864 (1984) (identification deemed reliable where the witness observed defendant for a period of only 30 seconds under conditions causing his viewing to be made with a "heightened degree of attention" as offender was seeking "nighttime entrance to a private home").

¶ 39 The defendant also argues that the identifications cannot be compared to any prior physical descriptions because none were provided to the police by any of the witnesses. He maintains that the few details provided to the police were inaccurate; namely, his height, hair color, eye color, the neck tattoo, and the Cubs shirt that was never found. However, generally,

discrepancies and omissions as to physical characteristics are not fatal and affect only the weight to be given to identification testimony. *People v. Cruz*, 196 Ill. App. 3d 1047, 1054-55 (1990) (stating that the failure to provide the police with any description should affect only the weight of the evidence). Accordingly, the defendant's ineffectiveness claim based on counsel's failure to file the motion to suppress the witnesses' lineup identifications also fails under the prejudice prong of *Strickland*.

¶ 40 Next, the defendant contends that his trial counsel was ineffective for failing to adequately impeach the eyewitnesses and for eliciting prejudicial evidence. Specifically, he argues that his trial counsel was ineffective for: (1) failing to argue to the jury that the lineup identifications were unreliable because he was the only subject shackled; (2) failing to impeach Alexis by submitting evidence that he described the gunman as being 6'2" tall; (3) failing to impeach Brandon with a prior inconsistent statement he made to the police; (4) eliciting testimony from Robert that he called Robert a "spic" five months before the shooting; (5) telling potential jurors that he could not afford bail; and (6) failing to submit evidence that his photo was included in the array of photos shown to Ivory on June 20, 2010.

¶ 41 "Generally, the decision whether or not to cross-examine or impeach a witness is a matter of trial strategy which cannot support a claim of ineffective assistance of counsel." *People v. Smith*, 177 Ill. 2d 53, 92 (1997). However, the complete failure to impeach a witness where the evidence is closely balanced and the matter is significant may support an ineffective assistance claim. *People v. Salgado*, 263 Ill. App. 3d 238, 246-47 (1994).

¶ 42 Two of the defendant's claims of ineffective assistance of counsel fail under the first prong of *Strickland.* First, the defendant argues that his trial counsel failed to argue to the jury that the lineup identifications were unreliable because of the shackles. However, we cannot find

that trial counsel's performance was deficient where there is no evidence in the record that the witnesses saw that the defendant was shackled at the time they viewed the lineup.

¶ 43 Likewise, the defendant's claim that counsel erred by failing to impeach Alexis by submitting evidence that he told the police that the gunman was 6'2" tall is belied by the record. Alexis, in fact, contradicted himself on this issue during his cross-examination when he first admitted telling the police the offender was 6'2" and then later denied doing so. While the defendant maintains that "no police officer was called to testify about [Alexis's] prior description," the record is devoid of any contradictory evidence, such as a police report or any affidavit from any officer who could have been called to refute Alexis's denial. Thus, we do not find that trial counsel's performance was deficient on these two contentions of error.

¶ 44 The remaining claims fail under the prejudice prong of *Strickland.* In support of his argument regarding Brandon's prior statement to police, the defendant refers to a police report attached to his posttrial motion. The police report states that, on June 20, 2010, Brandon observed Elias who was "with three other males but he could not identify them. *** Brandon [] related that he could not identify anyone who was with [Elias] and did not view a photo array." However, the police report does not state that Brandon was asked to view a photo array and refused to do so because he could not identify anyone. Brandon was specifically asked on cross-examination whether he was not shown a photo array on June 20 because he told police that he could not identify anyone other than Elias, and he answered "no." Regardless, he admitted that he never provided the police with a physical description of the defendant and that he had never seen the defendant before the shooting. Therefore, we cannot find that the defendant was prejudiced by the failure to admit the police report where the record shows that Brandon was

cross-examined about the details contained therein and other witnesses besides Brandon identified the defendant.

¶ 45 As to the defendant's claims that trial counsel elicited prejudicial evidence when he had Robert testify that the defendant had called him a "spic" five months earlier, he fails to overcome the presumption that eliciting Robert's testimony was a matter of trial strategy or establish that he was prejudiced by the testimony. Indeed, this encounter between the defendant and Robert could have been used to discredit Robert's identification by providing him with a motive to wrongly implicate the defendant in the shooting. Likewise, the defendant's claim that counsel was ineffective when, during jury selection, he asked "how many of you think because [the defendant] couldn't afford bail he must be guilty" also fails because he fails to demonstrate that he was prejudiced. The record shows that the State objected to defense counsel's question and the circuit court sustained the objection. Further, the record demonstrates that the jurors were properly questioned during *voir dire* and admonished about the presumption of innocence.

¶ 46 Regarding his claim that counsel erred when he failed to adequately impeach Ivory, the defendant refers us to documents attached to his posttrial motion. The defendant submitted Ivory's June 20, 2010, photo lineup advisory form and the photos she viewed, which included one of him. While we agree that counsel's performance may have been deficient in failing to cross-examine Ivory using these documents, we do not find that the defendant established that he was prejudiced by this deficiency where counsel had cross-examined Ivory on the fact that she was unable to identify anyone from the photos shown to her on June 20, 2010. Even had the fact been brought out that the defendant's photo was contained in those photos, the "failure to identify a defendant at a line-up does not negate the credibility of a later identification" (*People v. Philson*, 71 Ill. App. 3d 513, 521 (1979)). Ivory subsequently identified the defendant in a

physical lineup in September 2010 and in court. Thus, the fact that Ivory failed to do so on June 20 does not render her later identifications incredible. Furthermore, there were several other witnesses besides Ivory who identified the defendant. Thus, this claim of ineffective assistance of counsel fails under the prejudice prong of *Strickland.*

¶ 47 Next, the defendant contends that he is entitled to a new trial based on the State's improper remarks during opening, closing and rebuttal arguments. Specifically, he argues that the State misstated the evidence when the prosecutor argued that: (1) there was no evidence that his photo was included in Ivory's June 20, 2010, photo lineup; (2) Brandon did not make a prior inconsistent statement to the police; and (3) Alexis denied knowledge of the crime because he was afraid of the defendant. The defendant further argues that the State's references to the family's sense of security were highly prejudicial and appealed to the jury's sympathy.

¶ 48 The defendant concedes that no timely objections to the State's comments to which he now complains were raised at trial and therefore these issues are forfeited. *People v. Coleman*, 227 Ill. 2d 426, 433 (2008) (stating that to preserve an issue for appellate review, a defendant must both object at trial and raise the issue in a written posttrial motion). However, he urges this court to review them under the plain-error rule.

¶ 49 "[T]he plain-error doctrine bypasses normal forfeiture principles and allows a reviewing court to consider unpreserved error when either (1) the evidence is close, regardless of the seriousness of the error, or (2) the error is serious, regardless of the closeness of the evidence." *People v. Herron*, 215 Ill. 2d 167, 186-87 (2005). Under the first prong, the defendant must prove prejudicial error, meaning he must show both that there was plain error and that the evidence was so closely balanced that the error alone severely threatened to tip the scales of justice against him. *Id.* In the second instance, the defendant must prove there was plain error

and that the error was so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process. *Id.*

¶ 50 In this case, we agree with the State that neither prong of the plain-error doctrine is met. First, with the number of witness identifications adduced at trial, we cannot find that the evidence was so closely balanced that the alleged errors tipped the scales of justice against him. Thus, the first prong of the plain-error doctrine is not satisfied. Second, we do not find that the alleged errors are so serious that they affected the fairness of the defendant's trial and challenged the integrity of the judicial process.

¶ 51 Moreover, the defendant fails to establish that any errors occurred. The State is allowed to comment on what the expected evidence will be and reasonable inferences therefrom in opening statements. *People v. Cloutier*, 156 Ill. 2d 483, 507 (1993). Similarly, prosecutors have wide latitude in closing argument to comment on the evidence and draw reasonable inferences therefrom, or reply to comments made by defense counsel. *People v. Campbell*, 199 Ill. App. 3d 775, 783 (1990). A reviewing court will find reversible error only if the defendant demonstrates that the improper remarks were so prejudicial that justice was denied or that the verdict resulted from the error. *People v. Burney*, 2011 IL App (4th) 100343, ¶ 65, as modified on denial of reh'g (Jan. 26, 2012).

¶ 52 The defendant contends that the State misstated the evidence when it argued that there was no evidence that his picture was included in the photo array that Ivory viewed on June 20, 2010, and that Brandon did not make a statement to the police about being unable to identify anyone other than Elias. As we pointed out earlier, there was no such evidence submitted at trial contradicting the State's arguments. The photo array that Ivory viewed on June 20 was not admitted into evidence nor was the police report which indicated Brandon could not identify

anyone. Even had the police report been admitted, the evidence included Brandon's testimony in which he denied making such a statement to the police. Thus, on these two points, we do not find that the prosecutor misstated the evidence adduced at trial when he stated in his rebuttal argument that there was "no evidence that [the defendant] was in that photo [array] at all" and that "Brandon said, 'no. I said, I didn't know who it was," but that "he would remember his face," when he was asked whether he told police that he could not identify the gunman.

¶ 53 Likewise, if the complained-of statements are within the rebuttal argument, the statements will not be held improper if they appear to have been provoked or invited by the defense counsel's argument. *People v. Toliver*, 246 Ill. App. 3d 842, 847 (1993). The comments that the defendant complains of regarding Alexis occurred during the State's rebuttal. When the prosecutor argued that Alexis was afraid to "testify to something that's [as] brutal and cold-blooded" as the shooting incident, the State was responding to defense counsel's general argument that Alexis's testimony was so "puzzling" that even the State was puzzled by it. The prosecutor stated in rebuttal that he did not find it puzzling that someone may be afraid to testify about a brutal event and that he was "not puzzled at all that someone would come in here and not want to remember, not want to tell people what happened after seeing the results of this man's conduct." Moreover, the record reveals that Alexis in fact testified that he was "really nervous" on the witness stand, evidence from which the State could have reasonably inferred that his initial testimony was the result of his courtroom nerves, fear, or desire not to re-visit the event in court. See *People v. Buss*, 187 Ill. 2d 144, 244 (1999) (stating that closing remarks must be reviewed in context in their entirety, not in isolation of one another); *Cloutier*, 156 Ill. 2d at 507 (prosecutors are allowed to comment on the evidence and draw reasonable inferences therefrom).

¶ 54 We further find that no error occurred when the prosecutor made isolated comments regarding the Sutton family's sense of security in their home or "castle." Reviewing the comments in their entirety, we find them to be nothing more than commonplace expressions which could not be misconstrued by the jury. See *People v. Daniel*, 2014 IL App (1st) 121171, ¶ 36 (finding the State comments that the defendant "shattered" or "destroyed" the victim's "American dream" were not especially prejudicial despite suffering from "hyperbole and dramatic rhetorical flourishes," as the comments were isolated); *People v. Moore*, 358 Ill. App. 3d 683, 692 (2005) (finding statements that the bullet was an "early Christmas gift" from the defendant and the victim's survival was "by the Grace of God" to be "nothing more than idiomatic expressions, which are commonplace enough that a jury would not misconstrue them"). Therefore, even if these issues had not been forfeited, the plain-error doctrine does not apply where no errors have occurred.

¶ 55 The defendant raises one issue pertaining to his closing argument which was properly preserved for appellate review. He argues that the trial court improperly sustained the State's objection to his statement that "What's notable about [the defendant] is a big nose. There is a scar. You can see it plainly from where you are." The State objected, arguing that the defendant's face as appearing in court was "not evidence."

¶ 56 It is not clear whether the appropriate standard of review for allegations of error in closing arguments is *de novo* or an abuse of discretion. See *People v. Maldonado*, 402 Ill. App. 3d 411, 421 (2010). However, we do not need to resolve the issue of the appropriate standard of review at this time, because, under either standard, we find the trial court's ruling was proper because there was no evidence adduced at trial referring to any scar on the defendant's nose. The record is devoid of any evidence establishing when the defendant acquired the scar and contains

only testimony from Doris that he had a "crooked nose." Therefore, the trial court's decision to sustain the State's objection to defense counsel's argument was correct.

¶ 57 Finally, the defendant argues that the State improperly shifted the burden of proof by asking its fingerprint examiner whether the defense could have requested fingerprint analysis on the glass. He argues that it was not the defendant's burden to prove his innocence. We note that the defendant failed to object to the State's question at trial, resulting in forfeiture of the issue. *Coleman*, 227 Ill. 2d at 433. Regardless, we do not find that the State shifted the burden of proof based on this one specific question asked on redirect examination in response to the timeliness of the testing request brought out during cross-examination. See *People v. Hammonds*, 409 Ill. App. 3d 838, as modified by 957 N.E.2d 386, 411 (2011) (finding that the defendant could not claim the State shifted burden of proof where he explored the timing of request for fingerprint and DNA testing with expert to which the State rebutted by eliciting fact that the defense may also make such evidence requests).

¶ 58 Based on the foregoing reasons, we affirm the judgment of the circuit court of Cook County.

¶ 59 Affirmed.

¶ 60 JUSTICE HALL, specially concurring.

¶ 61 Although I agree that defendant's conviction should be affirmed, I am compelled to comment on the use by police of a pretrial identification procedure in which defendant was the only participant in the lineup wearing shackles around his ankles. In my opinion, such a pretrial lineup procedure is almost always unnecessarily and impermissibly suggestive. However, in this case, because the in-court identifications of defendant were independently reliable under the

standard announced in *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972), I agree his conviction should be affirmed.